No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

STEVEN CLARK
Deputy Defender

KENNETH L. JONES
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street
8th Floor
Chicago, Illinois 60602
(312) 793-5472

COUNSEL FOR PETITIONER

Of Counsel:
Sheldon . rt Nagelberg

QUESTION PRESENTED FOR REVIEW

1. Whether a capital defendant's right to a jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution is violated by the prosecution's use of peremptory challenges to exclude racial minorities.

2. Whether State evidentiary rules of waiver can properly be applied to a capital defendant's right to a jury selected from a cross-section of the community as required by the Sixth and Fourteenth Amendment under the holding in Witherspoon v. Illinois, 391 U.S. 510 (1968).

3. Whether a capital sentencing statute that vests unreviewable discretion in the prosecution following conviction, offers the sentencing authority no meaningful standards and where the state supreme court has explicitly rejected comparison review is compatible with the due process clause of the Fourteenth Amendment and the prohibition against cruel and unusual punishment.

4. Whether the inconsistent application of a statutory aggravating factor which potentially renders all murders capital offenses deprived Hernando Williams of his rights under the Sixth and Fourteenth Amendments.

5. Whether the record in this case establishes that petitioner's pleas of guilty do not comport with due process where at no time during the plea proceedings was petitioner informed that his pleas would subject him to the same penalties he would receive if he were tried and convicted; and no clear affirmative notice was given by the prosecution that the death penalty would be sought if Petitioner plead guilty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

INTRODUCTION

TO THE CHIEF JUSTICES AND ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May It Please The Court:

Hernando Williams, petitioner, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Illinois affirming his convictions and the sentence of death following his pleas of guilty to murder, armed robbery, rape and aggravated kidnapping.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is (unreported). A copy of the opinion appears as Appendix A. The Order Denying Rehearing is in Appendix B.

STATEMENT OF JURISDICTION

This court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3). The opinion of the Supreme Court of Illinois was filed on May 27, 1983. A timely petition for rehearing was filed and subsequently denied on September 30, 1983. This petition is being filed within sixty days of the denial of the rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution
Article 6, Clause 2

This constitution, and the law of the United States which shall be made in pursuant thereof, and of all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

On April 3, 1978, Petitioner, Hernando Williams was charged by indictment with murder, armed robbery, rape and aggravated kidnapping in the Circuit Court of Cook County, Illinois. On July 20, 1978 the defense filed a motion asking the State to disclose whether or not they intended to seek the death penalty and if so what statutory aggravating factors would be relied upon. (R. 146)*

The motion for disclosure was entered and continued to August 11, 1978 at which time the state filed a written answer asserting the position that under the Illinois Death Act they were not required to disclose prior to trial an intent to seek the death penalty. (R. 153)

On March 1, 1979 a motion challenging the Constitutionality of the Illinois Death Act was filed. On August 29th argument was held on this motion. (R. 1018-1027) On October 9, 1979 Hernando Williams entered pleas of guilty to all the counts of the indictment. (R. 88) Prior to formally accepting the plea of guilty, the court advised Williams as to the consequences of his plea, stating:

> I must advise you further that you can be tried before this court or before a jury. If you are found guilty of murder, under the circumstances of which case the death penalty could be imposed.

---

* (R) References will be to the pages in the transcript prior to Mr. Williams' plea of guilty. (H) references will be to the report of proceedings starting with the plea and including the sentencing hearing.

* * *

> I must also advise you in addition to the possibility of the death penalty under the Code as it exists in the State of Illinois, is a further provision for the imposition of sentence for the crime of murder wherein it is provided the minimum term to be imposed shall be not less than 20 years not more than 40 years.
>
> If the Court finds that the murder again was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or if any of the aggravating factors listed in the Code proper were found to be present, the Court may sentence the defendant to a term of natural life imprisonment. (H. 10-13)

Following the court's acceptance of Mr. Williams' pleas, the prosecution moved that the case be recessed, since no decision had been made as to whether or not the state would seek the death penalty and that such decision would have to be cleared by the trial prosecutors' "superiors" (H. 63) When the case was recalled that afternoon the state requested a death penalty hearing. (H. 68-69) The case was continued to October 15, 1979. (H. 75)

On that date, Hernando Williams, a black man, elected a jury for his sentencing authority. (H. 93) The court denied the previously filed defense defense motion challenging the constitutionally of the Death Act. (H. 99) Jury selection commenced on October 16, 1979. (H. 116, 153)

Of the 128 prospective jurors examined during voir dire, 28 were black. Of these two were excused for cause on motion of the defense. One had already formed the opinion that Williams should be executed and the other took part in the investigation of the case. A total of 15 black jurors were excused for cause on the State's motion. (H. 6341) Eleven of the 20 peremptory challenges used by the State were directed at blacks, 8 during the selection of the actual jury, and 3 to remove all blacks alternates.

During the voir dire examinations the defense identified each juror by race and when the State's pattern of racial

exclusion became apparent, brought the matter to the court's attention. (H. 2005) The issue was formally raised in a written motion to dismiss the jury (H. 6341) which was denied after argument. (H. 3170) The State offered no justification and the court failed to require any justification for the prosecution's use of peremptory challenges against blacks.

During jury selection, the state moved to excuse for cause numerous jurors who voiced scruples against the death penalty. Among these was Delores Hudson whose relevant voir dire examination was excerpted in the Illinois Supreme Court's opinion:

> Q. [D]o you have any questions you have to ask me, at this point, about the procedure about what we are about - about what's going to happen in the situation, if you are selected as a juror?
>
> A. Not really, but I would like to say one thing, and I don't know if I has a right to ask, but I have a feeling about the electric chair.
>
> Q. What feelings do you have?
>
> A. I don't like it.
>
> Q. You don't like the electric chair. Miss Hudson, do you feel that in certain cases - or can you conceive of the situation where the death penalty would be an appropriate punishment?
>
> A. I- I- I- was always taught thou shall not kill, and I would feel, you know, I would sit there and - no matter what this person done, you know, to me, and I will sit there and write down that the death penalty, and I don't believe in it, you know, killing anybody, and that would be a burden on me, that my vote was in there to do this action, and I don't believe in it, you know.
>
> Q. Well, let me ask you this.
>
> [Prosecutor]: Cause.
>
> [Defense Counsel]: May I -
>
> [Prosecutor]: Motion for cause.
>
> THE COURT: Motion for cause is overruled. Counsel, there is a motion for cause.
>
> * * *
>
> Q. I am going to try and complete the question, if I am able to.

> The State is going to be seeking the death penalty against my client. Would you be able to wait and listen to here [sic] all the evidence before you make your decision on whether or not the death penalty should be applied?
>
> [Prosecutor]: Object.
>
> THE COURT: She may answer.
>
> A. THE JUROR: Well, just like I told you, I don't believe in the death chair, so -
>
> [Defense Counsel]: I have no further questions, Judge.
>
> THE COURT: You may step down, ma'am. Thank you.
>
> (Juror is excused): (Opinion p. 20-21)

At the conclusion of the initial stage of the death penalty hearing, Mr. Williams was found eligible for the death penalty based on two statutory aggravating factors. The first of these was that he had committed a murder during the commission of the various felonies, (H. 4173) See Ill. Rev. Stat., Ch. 38, Sec. 9-1(b)(6). The second factor found was that the victim was "material witness" against petitioner Section 9-1(b).7*

At the conclusion of the second phase of the sentencing hearing the jury was instructed to consider the aggravating factors they had perviously found, as well as all other non-statutory factors. The jury returned verdicts directing the court to sentence Hernando Williams to death. (H. 5510) Subsequently this sentence was imposed upon Mr. Williams with the court stating on the record that by the terms of the Illinois statute it was bound by the jury's verdict. (H. 5558)

---

* The defendant committed the murder with intent to prevent the murdered individual from testifying in any criminal prosecution or giving material assistance to the State in any investigation or prosecution, either against the defendant or another; or the defendant committed the murder because the murdered individual was a witness in any prosecution or gave material assistance to the State in any investigation or prosecution, either against the defendant or another.

Counsel independent of the Cook County Public Defender which had represented Hernando Williams at the plea and sentencing hearing were appointed to prosecute a motion to vacate the pleas of guilty. The motion was denied and the case appealed to the Illinois Supreme Court.

In affirming Hernando Williams' conviction and the sentence of death, the Illinois Supreme Court implicitly accepted the racial motivation for the state's use of peremptory challenges, and based its affirmance on the holding in Swain v. Alabama, 380 U.S. 202, (1965) that the exclusion of prospective jurors because of race became a Constitutional violation only when it is shown to exist in "case after case". In his brief, petitioner provided the court with statistics gathered by the Illinois Coalition Against the Death Penalty and argued that these statistics supported a conclusion that the Swain test had been satisfied. The court pointed out certain deficiencies in the statistics and noted that they had not been presented to the trial court. (Opinion, p. 10)

On rehearing Petitioner pointed out that Williams' case was an appeal from a motion to vacate guilty plea and argued that the case could be remanded for a hearing on the Swain issue. The rehearing was denied without comment. (See Appendix B)

As to the exclusion of Delores Hudson, the court apparently concluded that the record did not establish that she qualified for exclusion under the standard of Witherspoon v. Illinois, 391 U.S. 510 (1968) but that the error of her exclusion had been waived because defense counsel voiced the wrong objection. (Opinion p.21) The Court's only authority for this holding was a state case dealing with an evidentiary issue. Town of Cicero v. Industrial Com., 404 Ill. 487, 89 N.E. 2d 354 (1950)

The court also rejected Petitioner's arguments concerning the validity of the Illinois Death Act. Citing its previous decisions on the issue and specifically rejected the argument that comparison review was necessary in capital cases. (Opinion p. 2-3)

THE MANNER IN WHICH THE CONSTITUTIONAL CLAIMS WERE RAISED

The State's racially motivated use of peremptory challenges was brought to the trial court's attention prior to the completion of the jury selection process. (H. 2005) It was formally raised in a written motion to dismiss the jury. (H. 3170. 6341) It was also presented in the written motion to vacate the plea of guilty and briefed before the Illinois Supreme Court. (Opinion p. 10)

The exclusion of Delores Hudson in violation of the holding in Witherspoon v. Illinois was raised before the trial court by the following defense objection:

> Mr. Nudelman: I want to make a record of something. For the purposes of the record, Judge we are...Again, Mrs. Hudson was excused over our objections, Judge. We do not feel we had a sufficient opportunity to go into proper witness questioning and I am making the objection." (H. 2410-11)

The improper exclusion of scruppled jurors under the guidelines of Witherspoon was raised in the motion to vacate and briefed before the State Supreme Court. (Opinion p. 15-23)

The constitutionality of the Illinois Death Act was raised prior to the hearing in a written motion (R. 1018-1027); was presented in the motion to vacate the plea and briefed before the Illinois Supreme Court. (Opinion p. 3-4)

REASONS FOR ALLOWANCE OF THE WRIT

I. HERNANDO WILLIAMS' RIGHT TO A JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE PROSECUTION'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE RACIAL MINORITES FROM THE JURY WHICH ULTIMATELY IMPOSED THE DEATH PENALTY ON MR. WILLIAMS. ALTERNATIVELY IN LIGHT OF THE ON-GOING HISTORY OF RACIALLY MOTIVATED USE BY PROSECUTORS IN COOK COUNTY OF PEREMPTORY CHALLENGES, AS RECOGNIZED BY AT LEAST ONE ILLINOIS SUPREME COURT JUSTICE AND ONE DIVISION OF THE STATE APPELLATE COURT, THIS CAUSE SHOULD BE REMANDED TO THE STATE TRIAL

COURT FOR AN EVIDENTIARY HEARING IN LINE WITH THE HOLDING IN SWAIN V. ALABAMA, 380 U.S. 202 (1965)

A. HERNANDO WILLIAMS' RIGHT TO BE TRIED BEFORE A JURY WAS VIOLATED BY THE PROSECUTION'S DELIBERATE EXCLUSION OF ALL BLACKS FROM THE PETIT JURY.

Hernando Williams plead guilty to murder, armed robbery, aggravated kidnapping and rape in the Circuit Court of Cook County, Illinois. Following a sentencing hearing had before a jury, Williams was sentenced to death for murder.

The woman who was killed was white. Most of the State's witnesses were white. The defendant is black. His family and the people he knew who asked the jury to spare his life were black. The jurors that heard the testimony and whose verdict condemned Hernando Williams to death were all white.

Of the 128 propsective jurors examined during voir dire, 28 were black. Of those two were excused for cause on motion of the defense. One had already formed the opinion that Williams should be executed and the other took part in the investigation of the case. A total of 15 black jurors were excused for cause on the state's motion. Fleven of the 20 peremptory challenges used by the State were directed at blacks: 8 during the selection of the actual jury, and 3 to remove all the blacks called as potential alternates. (H. 6341)

During the voir dire examinations the defense identified each juror by race and when the State's pattern of racial exclusion became apparent, brought the matter to the court's attention. (H. 2005) The issue was formally raised in a written motion to dismiss the jury (H. 6341) which was denied after argument. (H. 3170) The State offered no justification and the court failed to require any justification for the prosecution's use of peremptory challenges against blacks.

The exclusion of racial minorities from petit juries has been recognized as a violation of the Fourteenth Amendment. Whitus v. Georgia, 385 U.S. 545 (1967) Yet under the authority

of this Court's holding in Swain v. Alabama, 380 U.S. 202 (1965) the Illinois Supreme Court rejected Williams' argument that his rights under the Sixth and Fourteenth Amendment were violated by the prosecution's use of peremptory challenges to obtain an all white jury.

Ironically the holding in Swain does not condone the racially motivated use of peremptory challenges. Rather it requires a showing of a systematic and purposeful exclusion of minorities over a period of time. 380 U.S. 202, 223, The Swain decision was based on the equal protection clause of the Fourteenth Amendment and not on the Sixth Amendment right to trial by jury which was subsequently recognized in Taylor v. Louisiana, 419 U.S. 522 (1975).

Aside from the fact that Swain is not truly a right to jury case, further questions concerning the continued validity of its holding have arisen.

In their dissent from the denial of certiorari in McCray v. New York, ___ U.S. ____, 33 Cr. L. 4067 (1983), Justices Marshall and Brennan stated that those cases presented "a significant and recurring question of constitutional law: whether the State's use of peremptory challenges to exclude all potential Negro jurors because of their race violates a criminal defendant's right to an impartial jury drawn from a fair cross-section of the community." Justices Stevens, Blackmun and Powell, while maintaining that certiorari was properly denied, agreed with the dissenting Justices appraisal of the importance of the underlying issue, but felt it to be a sound exercise of discretion to allow the States to serve as laboratories in which the issue receives further study before it is addressed by this Court.

In his petition for rehearing before the Illinois Supreme Court, Williams pointed out the fact that the opinions in McCray indicate that the holding in Swain is no longer controlling and, in essence urged the Illinois Court to assume the experimental role called for by the concurring justices. The Illinois Supreme Court denied the rehearing without comment. (Appendix B)

arguably applicable. Others may totally refrain from ever seeking the death penalty.

A good example of the arbitrariness which exists in pratice appears in a comparison of two similar central Illinois jurisdictions, Champaign and Sangamon Counties. Since the enactment of the Illinois Death Penalty Statute, prosecutors in Champaign County have sought the death penalty in every murder case in which they felt an aggravating factor was present. See People v. Kirkpatrick, 70 Ill. App. 3d 166, 387 N.E. 2d 1284 Ill. App. 1979) (double murder); People v. Gleckler, 82 Ill. 2d 145, 411 N.E. 2d 849 Ill. (1980) (double murder); People v. LeCrone, Illinois Appellate Court, 4th District, No. 15877 (murder-robbery); People v. Peeples, 4th Dist, No. 16759 (murder-attempted rape). This practice is in sharp contrast to the apparent policy in nearby Sangamon County, where although five murder defendants were subject to the death penalty because a statutory aggravating factor existed, the prosecution has never sought the death penalty. See People v. Nesbit, Cir. Ct. Sangamon County No. 78-CF-537 (second murder convictions); People v. Brents, 4th Dist, No. 16274 (murder-robbery); People v. Lee, 4th Dist, No. 16273 (murder-robbery); People v. Hicks, 4th Dist, No. 16674 (murder-attempted murder-armed robbery); People v. Groth, Sangamon County Case No. 70-CF702 (second murder conviction).

In the case of People v. LaPointe, 88 Ill. 2d 482, 431 N.E. 2d 344, (1972) the defendant entered a non-negotiated plea of guilty to armed robbery and murder. The State did not ask for a death hearing. In reviewing the life sentence imposed upon LaPointe, the Illinois Supreme Court noted:

> The record in this case indicates that the defendant, a young man with a significant history of criminal activity, acted with premeditate, cold-blooded deliberation in deciding to kill a cab driver, a homicide for which the death penalty could have been sought, had the prosecutor elected todo so. Following that murder and while being held in the county jail, he displayed a callous attitude and complete lack of remorse by

The Illinois Supreme Court in Williams' case has foreclosed any further consideration of the issue of the prosecution's racially motivated use of peremptory challenges. See People v. Withers, ___ Ill. App. 3d ___, 450 N.E. 2d 1323 (1st Dist., (1983). In that case the State exercised seven of the nine peremptory challenges used to exclude blacks. The court noted:

> The record reveals that the jurors were diverse but alike in many ways. Most were homeowners and middle-aged. Many had one or more children still in school. Some were young and unmarried. Some were members of civic or church-related organizations or associations, but most were not. Most read the same kinds of magazines-Time, Reader's Digest, Sports Illustrated, National Geographic. Two were members of the National Rifle Association. For these reasons defendant contends that the circuit court erred when it refused to require the State to show that it had not exclude all the prospective blacks jurors simply because they were black. 450 N.E. 2d at. 1327.

The court then quoted verbatim from the Illinois Supreme Court's holding in Williams, and concluded that the argument must be rejected. 450 N.E. 2d at 1327-29.

Unfortunately, until Swain is specifically overruled, or modified, the courts of this nation will continue to consider it the controlling authority. See Footnote 3 in Justice Marshall's dissent from denial of certiorari in Gillard v. Mississippi, ___ U.S. ___, 34 Cr. L. 4013 at 4014 (1983). Only two state's courts have had the initiative to recognize the validity of this issue and in order to do so had to rely on the state's constitution. People v. Wheeler, 22 Cal. 3d 258, 583 P. 2d 748 (1978); Commonwealth v. Soares, 377 Mass. 593, 387 N.E. 2d 499 (Mass., 1979). The issue is apparently considered open in New Mexico. See State v. Crespin, 94 N.M. 486, 812 P. 2d 716 (1981).

Even less experimentation can be expected from the Circuit Courts in the Federal System which are certainly bound by the Swain precedent. In United States v. Carter, 528 F. 2d 844 (8th Cir., 1975) cert. denied 425 U.S. 961, the Court of Appeals recognized that a serious question arose from the practice of the United States attorney in striking most or all blacks from the jury when the defendant was black. The Court urged the trial

courts to exercise their supervisory powers and require the prosecutor to discharge his duties in a fair, even and constitutional manner, and thus ensure that no juror is denied the priviledge of serving on a jury solely because of his race. However, the Eighth Circuit, sitting en banc, has now concluded that it has no choice but to follow Swain until this Court reconsiders that decision. See United States. v. Childres, ___ F. 2d ___,33 ___, Cr. L. 2519, at 2521 (1983). Significantly, the decision of the Illinois Supreme Court in the instant casue is cited as authority for precluding the Circuit's experimentation on this issue and the continued validity of the Swain holding.

It is respectfully urged that this Court grant certiorari in the instant cause to reconsider the continued validity of the holding of Swain v. Alabama.

B. WHERE AT LEAST ONE JUSTICE OF THE ILLINOIS SUPREME COURT AND ONE DIVISION OF THE ILLINOIS APPELLATE COUPT HAVE RECOGNIZED THE EXISTENCE OF "AN OPEN SECRET" THAT PROSECUTORS IN CHICAGO AND ELSEWHERE HAVE HISTORICALLY AND SYSMATICALLY USED PEREMPTORY CHALLENGES TO REMOVE ALL OR ALL BUT TOKEN BLACKS FROM JURIES IN CRIMINAL CASES WITH BLACK DEFENDANTS, PETITIONER WILLIAMS IS ENTITELD TO A HEARING ON THIS ISSUE UNDER THE GUIDELINES OF SWAIN V. ALABAMA, 380 U.S. 202 (1965).

In his opening brief before the Illinois Supreme Court Petitioner, Hernando Williams presented statistics from the Illinois Coalition against the Death Penalty in support of his argument that his rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated in that the prosecution used peremptory challenges to exclude blacks from jury service. The statistics, as pointed out by the Illinois Supreme Court indicated that over half the juries in 43 recent capital cases were all white and that most of the other

capital juries had only one black* The court went on to point out what it perceived as imperfections in the statistics offered, such as the lack of any indication as to how many peremptory challenges were used in each case. (Opinion p. 10)

In Swain v. Alabama, 380 U.S. 202 (1964) this Court held that a defendant would be entitled to relief if he could establish a systematic exclusion of minorities from petit juries over a period of time. It is petitioner's belief that the

---

*Juries for Blacks for Conviction

(c) Hill	1 Black
(c) D. Williams	1 Black
(c) Yates	1 Black
(c) F. Walker	1 Black
Lewis	All White
Lampkin	All White
(c) Gaines	All White
(c) Cobb	All White
Tillis	All White
Tiller	All White

Juries for Blacks for Sentencing

Hill	1 Black
D. Williams	All White
Yates	1 Black
F. Walker	All White
Lewis	All White
Lampkin	All White
Gaines	All White
Cobb	All White
Tillis	All White
Tiller	All White
H. Williams	All White
Jones	1 Black

Juries for White

10 Whites had juries. 9 were all White. In one the lawyers could "recollect" one to two Blacks.

Juries for Hispanics

The four Hispanics had juries. One was all White, another had 1 Black, the third had 4 Blacks and the last had 1 Black and 1 Hispanic. (The (c) designates cases from Cook County.)
From Illinois Coalition Against the Death Penalty, Bulletin, October, 1980.

figures put before the Illinois Supreme Court are sufficient to require a hearing on this issue. In his petition for rehearing before the Illinois Supreme Court, Petitioner in fact argued that in light of the procedural history of his case a remand for a hearing on this issue would be appropriate[1]. The rehearing was denied without comment.

Since the denial of the reheairng in petitioner's case, the Illinois Coalition Against the Death Penalty has released updated figures.[2] Since the enactment of the latest Illinois Death Act, there have been 61 Juries involved either in the trial or the penalty phase. Of these, 40 were all white, ten had one black.

---

[1] Because petitioner's conviction was by plea of guilty, in order to perfect an appeal, he had to, within 30 days of final judgment prosecute a motion to withdraw the plea. Under Illinois Supreme Court rules a hearing may be held on such a motion.

[2]

Total Juries - 61
Total Jurors - 732
Total from minorities - 44 (6%)

Same jury for conviction and sentencing	39
Jury for conviction only	10
Jury for sentencing only	6
Two separate juries	3
Bench for conviction and sentencing	8
Bench for conviction only	3 (1.5%)
Bench for sentencing only	12
Pled Guilty	4
Plea with jury sentencing	2
Plea with bench sentencing	1

All White	40 (66%)
1 Black	10 (16%)
1 or 2 Blacks*	1 (1.5%)
2 Blacks	1 (1.5%)
4 Blacks	2 (3%)
5 Blacks	1 (1.5%)
1 Black/1Hispanic	1(1.5%)
2 Blacks/1Hispanic	1(1.5%)
4 Blacks/1Hispanic	1(1.5%)
3 Blacks/2Hispanics	(1.5%)
1 Black/1 Asian	1(1.5%)
1 Hispanic	2

*As recollected

Illinois Coalition Against the Death Penalty July 31, 1983.

Aside from the statistics concerning capital cases, the Illinois courts have noted the problems of the prosecutor's racially motivated use of peremptory challenges. In the case of People v. Payne, 106 Ill. App. 3d 1034, 435 N.E. 2d 1046 (1983) the appellate court reversed a conviction holding that the prosecution's systematic exclusion of Blacks in that case solely because of race was invidious and a violation of an individual's Sixth Amendment right to a jury. The same division of the appellate court, (1st Dist., 3rd Div.) also found improper racially motivated peremptory challenges in the cases of People v. Gosberry, 109 Ill. App. 3d 647, 440 N.E. 2d 954 (1982) and People v. Gillard, 112 Ill. App. 3d 799, 445 N.E. 2d 1292 (1983).

All of these decisions were rendered before the Illinois Supreme Court's opinion in Peititioner's case in which that court blindly adhered to its previous interpretation of Swain v. Alabama.

The State sought and was granted discretionary review in all three cases. Payne has been argued but not yet decided. The state's petition for leave to appeal in Gillard was recently granted, Ill. S. Ct. Docket #58145. In Gosberry, the state's petition was granted and without argument or briefs, the Illinois Supreme Court reversed the appellate court's holding in that case citing dicta from the case of People v. Davis, 95 Ill. 2d 1, 447 N.E. 2d 353 (1983) in which the racial exclusion argument had been rejected at least partially because there was an insufficient record to support the argument.

Justice Seymour Simon dissented from the summary action in Gosberry and pointed out that the Payne case was still pending before the court. Justice Simon noted in his dissent the growth in the number of cases in which the issue had been raised. He went on to conclude:

> In view of the staggering number of cases in this State raising this issue, I question whether it has not been established that prosecutors in Illinois have been purposely and systematically using peremptory challenges in case after case to achieve the exclusion of

> black persons from juries in a State having one of the largest pouplation of blacks persons in the nation." 449 N.E. 2d at 818.

Justice Simon also quoted from the opinion in People v. Gillard, 112 Ill. App. 3d 799, 445 N.E. 2d 1293, 1299, in which Justice Rizzi of the appellate court wrote:

> It is an open secret that prosecutors in Chicago and elsewhere have been using their peremptory challenges to systematically eliminate all Blacks, or all but token Blacks, from juries in criminal cases where the defendants are Blacks. (Citation omitted) 445 N.E. 2d at 1297.

Another significant factor in Gillard was the observations of the trial judge, the Honorable Howard Miller. After denying a defense motion to discharge the jury due to the prosecutor's racially motivated use of peremptory challenges because he was bound by the strait-jacket of Swain, Judge Miller noted for the record:

> I think that the attitude-I am not speaking of you individuals, I am talking about the attitude of the State's Attorney's Office, period. I find this is morally reprehensible and in my opinion there is a purposeful discrimination, in my opinion. It's an invidious discrimination. Its a bad policy that they have and I find the State's Attorney's attitude and policies towards removal of Black people from the jury is, to me, is personally offensive not only as a Black person, but as a Black lawyer and a Black judge.
>
> * * *
>
> In my past experience I found this same policy, the same procedures followed.
>
> All right. Your motion is denied.
>
> 445 N.E. 2d at 1295.

Again, in his dissent in Gosberry, Justice Simon wrote:

> Whether this systematic use in Illinois of peremptory challenges to exclude black jurors on the basis of race violates the equal protection clause of the Fourteenth Amendment even under the majority's interpretation of the standards announced by the Supreme Court in Swain calls for an examination by this court. 449 N.E. 2d 819.

If it is this Court's intention to allow the holding in Swain to remain in force, it is incumbent on this Court to set standards that will allow defendants who face trial or have been tried in jurisdictions such as Cook County, Illinois where the prosecution's historic racially motivated use of peremptory challenges are common knowledge subject to judicial notice to litigate that issue. Certiorari should be granted in this case to settle the question of the continued validity of Swain v. Alabama, or alternativly to recognize that the holding in Swain requires that Petitioner be given the opportunity to establish the continuing historic and systematic exclusion of blacks from criminal juries in Cook County, Illinois.

II. HERNANDO WILLIAMS' SIXTH AMENDMENT RIGHT TO A JURY DRAWN FROM A CROSS-SECTION OF THE COMMUNITY WAS VIOLATED BY THE EXCLUSION OF JURORS WITH SCRUPLES AGAINST THE DEATH PENALTY. IN AFFIRMING THE SENTENCES OF DEATH IMPOSED UPON WILLIAMS THE ILLINOIS SUPREME COURT ERRED BY MISAPPLYING STATE EVIDENTIARY WAIVER RULES TO A SIXTH AMENDMENT ISSUE.

Hernando Williams was sentenced to death by a jury from which jurors with scruples against capital punishment were excluded on the state's motion. During the jury selection process, the defense objected to these rulings. The issue was also raised in the post-hearing motion to vacate guilty plea and on direct appeal in the Illinois Supreme Court argument was advanced that 12 prospective jurors had been erronously excluded in violation of this Court's holdings in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980).

The Illinois Supreme Court held that, as to four of the venire persons in question the exclusion had "no reference to the death penalty" and that seven of the others were properly

excluded under the Witherspoon holding.* (Op. p. 16)

As to one of the jurors, Delores Hudson, the Illinois Supreme Court held that she was excluded for her views of the death penalty but that "any possible error in regard to Witherspoon was waived". (Op. p. 20) The court then set out excerpts from her examination, and stated its holding that because the defense voiced the specific objection as to her dismissal "that the defense did not have a sufficient opportunity to question the prospective juror." (Opinion p. 20) "any Witherspoon error was waived.

The actual objection was:

> MR. NUDELMAN: I want to make a record of something. For the purposes of the record, Judge we are...Again, Mrs. Hudson was excused over our objections, Judge. We do not feel we had a sufficient opportunity to go into proper witness question and I am making the objection."
>
> (H. 2410-2411)

The only authority cited by the Court to support its holding that this objection waived any Witherspoon issue was the case of Town of Cicero v. Industrial Commission, 404 Ill. 487, 495, 404 N.E. 2d 354 (1950) and a treatise on Illinois Evidence. (Op. p. 21)

---

*Petitioner maintains that all scrupled jurors were improperly excluded. As to two of the four whose exclusion the Court declared unrelated to the death penalty. Jean Samps, despite a belief in capital punishment was excused because she didn't want to "Play God" (R. 2237) and Joan Carter was excluded because she stated she would follow her "inner feelings" even if those feelings conflicted with the trial Court's instruction. Ms. Carter could not envision a situation where she would not follow the law. (H. 1478-81) (Op. 16-17) Under Witherspoon, the excusal of these jurors was error.

The application of state evidentiary rules of waiver to a question of a capital defendant's Sixth Amendment right to a jury reflecting of a cross-section of the community is highly questionable. Indeed, in the case of People v. Szabo, 94 Ill. 2d, 327 447 N.E. 2d 193 (1981) the Illinois Supreme Court refused to apply any concept of waiver to the improper excusal of two jurors stating: "we do not consider the improper-exclusion argument to be waived by the lack of a contemporaneous objection here." 447 N.E. 2d at 206. The question of whether or not the failure of the defense to object or voice the proper objection on a Witherspoon issue has been before this court in at least two cases. California v. Velasquez, 448 U.S. 903, (1980) and California v. Lanphear, 449 U.S., 801. In both these cases, the State court had held waiver could not be applied.

People v. Velasquz, 26 Cal. 3d 514 606 P. 2d 341 (Cal. 1980) and People v. Lanphear, 608 P. 2d 689 (1980). The prosecution appealed and this Court vacated the judgments and remanded in light of Adams v. Texas, 448 U.S. 38 (1980). California v. Velasquz, 448 U.S. 903, (1980) and California v. Lanphear, 449 U.S. 801 (1980).

In reaching its original decision, the California Supreme Court examined the procedural history of various cases which this Court had summarily reversed on Witherspoon issues. These included the case of Wigglesworth v. Ohio, 403 U.S. 947, (1971) in which the state court had held the issue of a juror's excusion waived. Indeed in Wigglesworth, the Ohio Supreme Court had held that the defense agreed to having the juror excluded. State v. Wigglesworth, 18 Ohio St. 2d 171, 248 N.E. 2d 607, 614 (1969). Nevertheless, the resulting death sentence was vacated.

In May v. State, 618 S. W. 2d 333, the Texas Court of Criminal Appeals, despite what three dissenting judges believed to be sufficient objections, held as did the Illinois Court in

this case that an insufficient objection had been made to preserve an Adams-Witherspoon issue. In May v. Texas, 454 U.S. 959 (1981) this court granted certiorari and vacated and remanded the case for reconsideration in light of Adams v. Texas.

In Bass v. Estelle, 699 F. 2d 1154 (1983) the Fifth Circuit held various Witherspoon errors waived. This holding was mitigated; the case being remanded for a hearing concerning allegations of incompetency, which included the failure to object to the improper excusal. However in Granviel v. Estelle, 655 F. 2d 673 (5th Cir.,1981) the Fifth Circuit held the absence of a contemporaneous objection did not constitute a procedural default. Thus holding was based on the apparent absence of a contemporaneous objection rule at the time of petitioner's trial. The holding by the Illinois Supreme Court in People v. Szabo, 94 Ill. 2d 327, 447 N.E. 2d 193 (1981) that the absence of an objection in that case did not require the application of the waiver doctrine is significant. Why should waiver be applied to Hernando Williams in the most severe technical form but not to Szabo?

In McCorquodale v. Balkcom, 705 F. 2d 1553 (11th Cir., 1983) the manner in which prospective jurors were questioned was held to violate the Witherspoon doctrine. The dissent in this case noted that no objection had been made by petitioner to the manner in which the jurors were questioned.

Likewise in Burns v. State, 556 S.W. 2d 270, (Tx. Cr. App. 1977) the court found "harmless" a Witherspoon-Adams violation and noted in passing that the only objection made was that the venire person should be questioned further. Relying on Davis v. Georgia, 429 U.S. 122, (1977) which held that the exclusion of a single juror in violation of Witherspoon required the vacation of the resulting death sentence, the Fifth Circuit, rejected the harmless error argument of the respondant. In dealing with a Wainwright v. Sykes, 433 U.S. 72 (1988) waiver argument advanced by respondent the court pointed out that much of the questioning

of the juror at issue dealt with the Witherspoon cause, and thus viewed in context the objection was sufficient to present the issue. The nature of the objection was identical to the interpretation given the defense objection at Petitioner's hearing by the Illinois Supreme Court. See Burns v. Estelle, 592 F 2d 1297 (5th Cir., 1979).

The holding in Witherspoon is not a grant of authority to the prosecutors in death cases, rather it is a limitation. It sets forth what the prosecution must establish in order to sustain the exclusion of a scrupled juror. Only a narrow class of individuals, those so opposed to the death penalty as to be unable under any circumstances to consider it, are excludable. The exclusion of a single venire person who does not meet this narrow test requires the vacation of the resulting death sentence. Davis v. Georgia, 429 U.S. 122 (1976) Obviously the burden of establishing that the prospective juror qualified for exclusion under Witherspoon must rest on the State. The defense does not have the burden of establishing the negative of the proposition, i.e. that the juror could consider the death penalty. The holding by the Illinois Supreme Court in Williams' case to the opposite actually conflicts with the long standing Illinois law that the burden of establishing the need to excuse a juror rests on the party seeking to have the juror excluded. People v. Cole, 54 Ill. 2d 481, 298 N.E. 2d 705 (1973).

Petitioner believes that despite the apparent confusion in some jurisdictions, that this Court has long settled the question of waiver on the Witherspoon issue. While the instant case does present the question, and could be a proper vehicle for this Court to explicitedly settle the issue, it is also a case which could be summarily disposed of by a grant of certiorari and a per curiam order vacating the death sentence imposed by the "hanging jury". (Witherspoon, 391 U.S. at 785) which condmended Hernando Williams to death. Cf. Wigglesworth v. Ohio, 403 U.S. 947 (1971).

III. THE ILLINOIS DEATH ACT BOTH ON ITS FACE AND AS APPLIED AGAINST HERNANDO WILLIAMS IS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As of July 31, 1983 there are 53 men under sentence of death in Illinois. Nine of these men have had their sentences affirmed by the Illinois Supreme Court*, despite the fact that a majority of the justices sitting on that court have declared their belief that the Illinois Death Act in unconstitutional. See dissenting opinions in People ex. rel Carey v. Cousins, 77 Ill. 2d 531, 397 N.E. 2d 809 (1979) and People v. Lewis, 88 Ill. 2d 129, 430 N.E. 2d 1045 (1981) especially concurring opinions and dissent by Justice Simon. The Illinois statute allows the prosecutor total discretion on the basic decision as to whether or not an individual will be subjected to a capital sentencing hearing; it offers no true guidance to the sentencing authority and the concept of comparative appellate review has been explicitly rejected by the Illinois Supreme Court. In this situation the enforcement of the statute assures the freakishness that was held to be violative of the prohibition against cruel and unusual punishment in Furman v. Georgia, 408 U.S. 238 (1972).

A. THE ILLINOIS DEATH ACT, BY VESTING TOTAL DISCRETION IN THE PROSECUTORS AS TO WHOM SHALL BE SUBJECT TO THE DEATH PENALTY ENSURES THAT CAPITAL PUNISHMENT WILL BE INFLICTED IN A FREAKISH MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES.

After a conviction for murder, a death penalty hearing in Illinois can be held only "[w]here requested by the State." Ill. Rev. Stat., 1977, Ch. 38 Section 9-1(d). The Supreme Court of Illinois recognized that his statutory language places the decision on whether to convene a death hearing solely and

*Based on statistics from Illinois Coalition Against the Death Penalty.

squarely in the hands of the Illinois prosecutors. People ex. rel. Carey v. Cousins, 77 Ill. 2d 531. 397 N.E. 2d 809 (1979). No other Jurisdiction grants such authority on what is basically a judicial issue to the executive branch of the government.

Four of the seven Justices now sitting on the Supreme Court of Illinois believe that the Illinois statute violates the Eighth Amendment. See People v. Lewis, 88 Ill. 2d 129, 430 N.E. 2d 1346 (1981).

In the Cousins case, three Justices -- Ryan, Clark, and Goldenhersh -- joined in a dissent. All three opined that giving the Illinois prosecutor the crucial decision, without any guiding standard, as to whom shall be spared from the ultimate penalty, violated the Eighth Amendment. A fourth, Mr. Justice Simon, adopted this positin in Lewis and has adherecd to it in subsequent cases. (He did not participate in the instant appeal). Although the three Cousins dissenters reaffirmed their views in Lewis, each refused to join Justice Simon for reasons ranging from stare decisis to reliance that this Court would review the case. People v. Lewis, 430 N.E. 2d at 1364. (Chief Justice Goldenhersh and Justices Ryan and Clark, concurring).

In Gregg v. Georgia, 428 U.S. 153 at 188, 96 (1976) this Court explained the holding in Furman v. Georgia, 408 U.S. 238 (1972) noting that Furman prohibits the death penalty "under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." 428 U.S. at 188.

The Illinois Death Act not only creates such a risk, but assures that capital punishment will be inflicted in an almost random manner. There are 102 counties in Illinois, each with one elected State's Attorney. Each of these prosecutors will approach any potential capital case with a different prosepctive. In some rural counties, a capital trial may be deemed simply too expensive in all but the most exceptional case. In other counties a prosecutor may, as an office policy, request a death penalty hearing in each and every case where the statute is

> wearing the tee shirt with the words "Elmurst Executioner" appearing thereon. We do not believe that the trial judge can be said to have abused his discretion in sentencing defendant to natural life imprisonment without parole.

Under the Illinois Death Act, 431 N.E. 2d at 353 a prosecutors in one county will seek the death penalty against individuals like LaPointe, but other state's attorneys will not. It is true that in Gregg v. Georgia, 428 U.S. 153, (1976) this Court recognized the necessity of prosecutors exercising pre-trial discretion. The issue here is whether, in the total absence of any statutory guidelines the prosecutors should be the only authority on whether or not the death penalty should even be sought. Certiorari ought to be granted to settle this question.

B. THE ILLINOIS DEATH ACT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT IN THAT IT PROVIDES NO DEFINED LIMITS ON THE FACTORS WHICH MAY BE CONSIDERED BY THE SENTENCING AUTHORITY, NOR DOES IT ALLOCATE A BURDEN OF PROOF AS TO THE ULTIMATE ISSUE.

The Illinois Death Act requires, that once the prosecutor has decided to seek the death penalty, the sentencing authority determine the defendant's eligibility for the ultimate penalty by finding beyond a reasonable doubt the existence of one or more aggravating factors. Ill. Rev. Stat., 1977, Chapter 38, Section 9-1(b)1-8. If one of these factors is found the sentencing authority is required to consider the qualifying factors and any "additional aggravating factors." These factors may include but need not be limited to the statutory factors necessary to render the defendant liable to the death penalty. Ch. 38, Sec. 9-1(c). The nature of the additional factors in aggravation is not defeined by statute. The admissibility of these nonstatutory factors is not limited by the rules of evidence. Ch. 38, Sec. 9-1(e). Thus, when an Illinois defendant has been found eligible for the death penalty, there are no restrictions on the factors which may then be considered as reasons for actually imposing death on that defendant.

In Zant v. Stephens, ___ U.S. ___, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983), this Court stated that due process of law would require a death sentence to be set aside where the aggravating label had been attached to conduct which was constitutionally protected, to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, or to conduct that actually should militate in favor of a lesser penalty. 77 L. Ed. 2d at 255. The Georgia statute met these concerns because it gave the defendant pretrial notice of th evidence which would be presented. 77 L. Ed. 2d at 255-256. In addition, all factors to be considered at sentencing were defined by Georgia trial court before their submission to the sentecing jury. See Hardy v. State, 245 G. 272, 264 S. E. 2d 209, 215 (1980). The Illinois Statute contains no comparable safeguards.

In Barclay v. Florida, ___ U.S. ___, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983), this Court considered whether the sentencer's reliance upon a nonstatutory aggravating factor violated constitutional safeguards. The Court held that it did not because the factor at issue concerned the defendant's criminal record, which was relevant even if not authorized as an aggravating factor by state law. The significance of this case is that the Florida statute required the sentencing court to set forth in writing its findings upon which the sentence of death was based, and that only because of this requirement could a reviewing court determine the sentencing court did not rely upon an impermissible aggravating factor. Again, the Illinois statute does not contain a comparable safeguard.

The statute also fails to allocate a burden of proof.

To convict and place a person in prison the State in a non-capital prosecution must establish proof beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1980). It follows that when the issue is whether or not an individual should be executed that the State must bear the burden of proof beyond a reasonable doubt. In the Illinois Death Penalty Act the only indication of a burden, indeed the only guidance given to the jury as to the

ultimate question, is that the jury must conclude that "there are no mitigating factors sufficient to preclude the imposition of the death sentence." Ill. Rev. Stat., Ch. 38, Sec. 9-1(g).

The jury in this case was not given meaningful guidance in its final deliberations because the statute establishes no burden of proof as to the existence or non-existence of mitigating factors. There is no valid effort to guide the jury in the consideration of the character and record of the individual before them as is required by the Eighth Amendment. Woodson v. North Carolina, 428 U.S. 280 (1976).

The conspicuous absence of any statutory language setting forth a burden of proof limiting consideration of aggravating factors, or directing consideration of mitigating factors result in a license for arbitrary results on the decision of whether or not to impose the death penalty.

Without such guidance it is intolerably likely that one sentencing authority would apply a preponderance burden, while another would apply the more familiar standard of proof beyond a reasonable doubt, while still another may focus upon a standard akin to the clear and convincing evidence test. Indeed, given the failure of the Illinois statute to require specific findings of facts, it will be impossible to determine whether a sentencer has applied any rational standard at all in weighing the evidence and reaching a decision. The Illinois statute also makes it intolerably likely that individual sentencers would differ on the allocation of these burdens between the defendant and the prosection. Such a system obviously creates a license for arbitrary procedure which this Court found impermissible in Furman v. Georgia, 408 U.S. 238 (1972).

The Illinois Death Act presents a total absence of any guidance even on the issue of burden of proof. For these reasons it is respectfully requested that certiorari be granted, and Petitioner's death sentence be vacated.

C. THE ILLINOIS DEATH SENTENCING SCHEME FAILS TO PROVIDE ADEQUATE COMPARATIVE REVIEW PROCEDURES TO INSURE THAT THE DEATH PENALTY IS NOT IMPOSED IN AN ARBITRARY OR DISPROPORTIONATE MANNER.

In Furman v. Georgia, 408 U.S. 238, (1972), this Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. A capital sentencing scheme must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.

Appellate review procedures which serve to insure that the death penalty is not being imposed arbitrarily and capriciously, by providing for comparative review, are essential to a constitutional death penalty scheme. Because such procedures are not yet provided for in Illinois, there is no guarantee that the death penalty will not be imposed in an arbitrary and capricious manner.

The Illinois Supreme Court initially indicated that a type of comparative review would be used in reviewing sentences of death. People v. Brownell, 79 Ill. 2d 508 (1980). In People v. Gleckler, 82 Ill. 2d 145, 411 N.E. 2d 849 (1980), the court asserted that it "historically exercised its power to reduce criminal sentences in both capital and non-capital cases, where it deemed them unduely severe." 82 Ill. 2d 145 at 162.

Yet in the instant opinion, in a single sentence the Court declares, in effect, that a menaingful comparative review would require a comparison between all potential death cases. (Op. p. 3-4) The implication here is that the court has rejected the argument simply because it seems like too much work.

In his brief before the Illinois Supreme Court petitioner pointed out that the Administrative Office of the Illinois Courts Annual Report to the Supreme Court of Illinois could provide at least a starting point for the task of comparative review.

Illinois also has a criminal sentencing commission whose's duties include development of "standardized sentence guidelines". Ill. Rev. Stat., 1981, Ch. 38, Sec. 1005-10-1. The task of comparative review is not impossible nor would it create an insurmountable burden.

Hernando Williams' sentence of death was affirmed in an opinion that makes no pretence of comparative review and in fact summarily rejected the concept. Ironically a very similar case, People v. Brownell, had previously been reviewed twice by the Supreme Court. In Brownell's first appeal, 79 Ill. 2d 508, 404 N.E. 2d 181 (1980) his death sentence was vacated due to the apparent reliance of the sentencing authority, a judge, on an improper aggravating factor, i.e. that the person killed was a material witness. Upon remand Brownell was resentenced to death. Again his death sentence was vacated. The holding on the second appeal applied an analogy of collateral estoppel since the prosecutor had, at one point offered not to seek the death penalty if Brownell would confess. He subsequently confessed after the offer was withdrawn. People v. Brownell, ___ Ill. 2d ___ 449 N.E. 2d 1312 (1983).

The facts in Brownell involved kidnapping, rape and murder, as did those in the instant prosecution. Following his arrest, Hernando Williams confessed, as did Curtis Brownell. Admittedly there are factual difference in that the victim in the instant case was held captive for a longer period of time. Yet no court has sought to explain how or even whether those difference justify the imposition of the ultimate penalty against Mr. Williams as opposed to the sentence of imprisonment which Curtis Brownell will serve.

This issue is presently before the Court in Pulley v. Harris, No. 82-1095. Certiorari should be granted to determine whether the lack of comparative review in Illinois violates the Eighth and Fourteenth Amendments to the United States Constitution.

IV. HERNANDO WILLIAMS' RIGHTS TO DUE PROCESS AND TO BE PROTECTED FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE APPLICATION OF AN AGGRAVATING FACTOR THAT POTENTIALLY RENDERS ALL HOMICIDES CAPITAL OFFENSES.

One of the statutory aggravating factors which the government must prove beyond a reasonable doubt in order to qualify an Illinois defendant for the death penalty is that the person killed "was a witness in a prosecution against the defendant," or was in position to give material evidence against the defendant. Ill. Rev. Stat., Ch. 38, 1978, Sec. 9-1(b)(7).

In the case of People v. Brownell, 79 Ill. 2d 508, 404 N.E. 2d 181 (1980) the Illinois Supreme Court noted that a literal interpretation of this language would subject nearly all defendants convicted of murder to potential death sentences. The court therefore ruled that the actual legislative intent was limited to those situations where "during an investigation or prosecution of a separate offense which has previously taken place, a witness is killed to stymie the investigation or prosecution." 404 N.E. 2d at 190.

In the instant prosecution the jury which sentenced Hernando Williams to death, found the existence of this factor as well as the statutory aggravating factors that the victim was killed in the course of the various felonies the victim witnessed. Ill. Rev. Stat., 1978, Ch. 389-(b)6.

The facts brought out at the sentencing hearing indicate that the victim in this case was kidnapped, and held for 36 hours in various locations. On the morning of her death, she was released from the trunk of petitioner's car, and told to take a bus home and not contact the police. Williams then drove around the block, saw the deceased on a front porch from which she was called. She was then taken to an alley and killed.

In this factual situation the Illinois Supreme Court some how concluded that the on-going felonies which constituted

statutory aggravating factors continued and that the deceased was killed because she was a material witness. The court's holding:

> Under these circumstances, the jury could have found both that the murder was committed "in the course" of the other felonies, and that the victim was an eyewitness. There is no significant difference between the circumstances here and a situation in which a defendant kidnaps and rapes the victim, sets her free, and at a later time kills her while she is on her way to testify against him. The latter situation clearly is within this court's understanding of the statute considered in Brownell. We do not see why the General Assembly would not have intended the circumstances here to be within the statutory factor. The legislature's clear concern, to protect persons who could assist in the apprehension and prosecution of the accused (see Remarks of Senator Knuppel, debate of amendment 3 to H.B. 10, 80th Gen. Assem., June 1, 1977, at 21-25), is served by such an interpretation. (Op. p. 9)

The court offered no explanation as to how, in light of this conclusion, it could be said the other aggravating factor, that the witness was killed in the course of a felony would be validly found by the jury.

In People v. Brownell, the Illinois Supreme Court recognized that the statutory aggravating factor could not be literally applied. Its holding in Williams however creates a problem since the killing of a material witness now may or may not be applicable in any given case depending upon the court's conclusion that the killing has "no significant difference" between killing the witness on his way to court.

This interpretation of the broad statutory language creates an absolute certainty that death sentences will be imposed in an arbitrary and capricious manner which violates the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420 (1981).

The importance here is that under Illinois law the finding of an improper aggravating factor requires, at a minimum, a new sentencing hearing. People v. Brownell, 79 Ill. 2d 508, 404 N.E. 2d 181 (1978). Even in non-capital cases, reliance on improper aggravating factors generally requires re-sentencing. People v. Conover, 84 Ill. 2d 400, 419 N.E. 2d 906 (1981). Although

Illinois courts have recognized some potential for harmless error, the test seems to be whether or not the sentencing authority was "arguable influenced" by the improper reliance. Cf. People v. Eddington, 77 Ill. 2d 41, 394 N.E. 2d 1185 (1979). Since the jury in this case believed that two separate aggravating factors existed and since the jury was instructed during its final deliberations to consider the aggravating factors that had previously been found, the death sentence imposed upon Hernando Williams must be vacated.

V. SINCE ONLY THE PROSECUTORS COULD DETERMINE WHETHER OR NOT THE DEATH PENALTY WOULD BE SOUGHT AGAINST HERNANDO WILLIAMS HIS RIGHTS TO DUE PROCESS WERE VIOLATED WHEN THE COURT ACCEPTED HIS PLEA OF GUILTY WITHOUT INFORMING WILLIAMS THAT EVEN A CONVICTION BY PLEA OF GUILTY WOULD SUBJECT HIM TO THE STATE'S ATTORNEY'S DISCRETIONARY ELECTION TO SEEK THE DEATH PENALTY.

At the time Hernando Williams, through his counsel, announced his intention to plead guilty to murder and other offenses, he did not and could not know whether he would face the death penalty. Under the Illinois Death Act a death penalty hearing can be held only when "requested by the State." Ill. Rev. Stat., Ch. 38, Sec. 9-1(d).

After the announcement of Petitioner's intent to enter pleas of guilty, the court, prior to accepting Williams' plea, attempted to admonish him pursuant to the requirement of Illinois Supreme Court Rule 402 and this Court's holding in Boykin v. Alabama, 365 U.S. 238, (1969).

The court's admonishments included the rights waived by a plea of guilty and an attempt to convey the consequences of the plea. The comments by the court concerning sentencing were:

> I must advise you further that you can be tried before this court or before a jury. If you are found guilty of murder, under the circumstances of which case the death penalty could be imposed.

* * *

> I must also advise you in addition to the possibility of the death penalty under the Code as it exists in the State of Illinois, is a further provision for the imposition of sentence for the crime of murder wherein it is provided the minimum term to be imposed shall be not less than 20 years not more than 40 years.
>
> If the Court finds that the murder again was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or if any of the aggravating factors listed in the Code proper were found to be present, the Court may sentence the defendant to a term of natural life imprisonment. (H. 10-13)

No clear statement was made as to the penalties which could be imposed after a plea of guilty.

The clear import of the judge's admonition is that Hernando Williams could be sentenced to death only "If tried and convicted" by a jury or "If found guilty" at a bench trial.

At the time of his plea of guilty Hernando Williams did not and could not have known the maximum penalty that his plea could subject him to. Williams' plea was not negotiated. In fact the State expressed surprise during the plea proceedings and emphatically stated that no promises or deals had been made. (H. 61) At an earlier hearing, in response to a defense motion for disclosure as to whether or not the death penalty would be sought the State characterized the case as "a potential death penalty case" but in essence refused to disclose to defendant, his counsel or the court whether or not that penalty would be sought. (H. 6116-6117) The response ended with the declaration that the prosecution would decide whether or not to seek the death penalty "If and when it is necessary." (H. 6117)

After judgment was entered on the pleas, the State moved that the case be passed, since no determination as to whether or not to seek the death penalty had been made. (H. 63) Thus even after the plea had been accepted and judgment entered thereon, no one in the courtroom, least of all defendant or his lawyers, knew the full consequences of the plea, i.e. whether the death penalty would be sought. Thus the record can not be said to show that

the plea of guilty was voluntary. Brady v. United States, 397 U.S. 742 (1970).

In order to comply with due process a plea of guilty cannot be accepted unless it appears from the record that the plea was entered knowingly, intelligently and voluntarily. Boykin v. Alabama, 397 U.S. 238 (1969). One of the requirements for a knowing and intelligent plea is that the defendant be advised of the maximum penalty that may be imposed following his plea of guilty. People v. Krantz, 58 Ill. 2d 187, 317 N.E. 2d 559 (1974).

In rejecting Petitioner's argument that the record in this case does not establish that Williams was aware of the consequnces of his pleas the Illinois Supreme Court held that the trial court's admonishment was sufficient to "convey the required warning." The court went on to conclude, based on various inferences i.e. pre-plea pleadings and motions filed subsequent to the plea, and Petitioner's statement that he had discussed with his attorneys the consequences of the plea, that Petitioner must have been aware of the potential death sentence. (Op. p. 6-7)

This holding, based on inferences, is in direct conflict with Boykin v. Alabama, 395 U.S. 238 (1969) which requires that the record show that a plea of guilty was in fact a knowing and intelligent waiver. Since the record itself fails to establish that Hernando Williams, at the precise moment he entered his plea of guilty, knew or could have known he faced the death penalty, certiorari should be granted to review whether or not the plea of guilty in this cause satisfied due process.

CONCLUSION

For the foregoing reasons, Petitioner Hernando Williams, respectfully requests that a Writ of Certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

STEVEN CLARK
Deputy Defender

KENNETH L. JONES
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street
8th Floor
Chicago, Illinois 606002
(312) 793-5472

OF COUNSEL:
Sheldon Bart Nagelberg

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

83-5785

APPENDIX FOR WRIT OF CERTERIORARI TO THE SUPREME COURT OF ILLINOIS

STEVEN CLARK
Deputy Defender

KENNETH L. JONES
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street
8th Floor
Chicago, Illinois 60602
(312) 793-5472

COUNSEL FOR PETITIONER

Of Counsel:
Sheldon Bart Nagelberg

Docket No. 53240—Agenda 2—September 1982.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. HERNANDO WILLIAMS, Appellant.

JUSTICE WARD delivered the opinion of the court:

After his pretrial motions had been denied, Hernando Williams changed his plea to guilty in the circuit court of Cook County to charges of murder, armed robbery, rape and aggravated kidnaping. The pleas were accepted and judgment was entered upon them. The State then asked for the death penalty, and after a bifurcated sentencing proceeding before a jury and the judge who had accepted the pleas, the defendant was sentenced to death on the murder conviction. He was sentenced to concurrent terms of 30 years for armed robbery and aggravated kidnaping. He was sentenced to 60 years for rape, but that sentence was ordered to run consecutively to a prior 30-year sentence for rape. The circuit court denied a motion by the defendant to vacate the pleas of guilty, and the defendant has taken a direct appeal to this court under the Constitution of Illinois (Ill. Const. 1970, art. VI, sec. 4(b)) and under our Rule 603 (73 Ill. 2d R. 603).

According to testimony given at the sentencing hearings and at an earlier motion to suppress statements of the defendant, the victim, Mrs. Linda Goldstone, on March 30, 1978, was employed at Northwestern Memorial Hospital in Chicago as an instructor in the Lamaze method of childbirth. On that evening, as she was alighting from her car in the vicinity of the hospital, she was approached by the defendant and robbed at gunpoint. He made her undress from the waist down. He then forced her into his car and, it appears, took her to a shop owned by his father. There he bound her hands and feet.

He then forced her into the trunk of his car. With Mrs. Goldstone in the trunk, the defendant picked up his sister at work and drove her home. He then drove the victim to a motel, forced her inside and raped her.

On the next day, with Mrs. Goldstone bound and locked in the trunk of the car, the defendant appeared at a suburban court where charges of aggravated kidnaping, rape, and armed robbery were pending against him. The case was continued, and the defendant then drove to visit a friend, Nettie Jones, at her apartment. While he was

there, people of the area heard cries for help coming from the trunk of his auto. Someone notified the police of the incident. The defendant drove away from a crowd that had gathered and proceeded to a tavern where he visited other friends.

Early that evening, the defendant checked into another motel. He forced Mrs. Goldstone into the the motel and again raped her. Later, he forced her back into the trunk and picked up his niece at a friend's house and drove the niece home. As he had done the day before, he drove his sister home from work and spent the evening visiting various taverns with friends.

In the meantime, police were searching for the defendant's car. The victim's husband, Dr. James Goldstone, a physician, after learning that his wife had not appeared for class that evening, notified the police of her absence. The victim's car was found by Northwestern University security officers. Early the following morning, Dr. Goldstone received a phone call from his wife in which she told him that she would be home soon. He heard a voice in the background say, "Shut up bitch, tell him you'll be home in about an hour." The victim asked Dr. Goldstone if he had called the police, and he told her to tell the man whose voice he had heard that he had not informed the police.

Officers investigating the incident at Jones' apartment obtained the license number of the car and learned that the defendant had visited Jones. The police searched the area for the auto without success and periodically watched the defendant's home, but the car was not located.

On April 1, at 6 a.m., the defendant released the victim from the trunk of the auto. He gave her $1.25 and instructed her to take a bus home and not to call the police. He then drove off. The victim, ignoring his instructions, ran to the porch of a nearby house for help. The person who came to the door refused to allow her to enter, but he did call the police. The defendant, who had only driven around the block to see whether his instructions would be obeyed, returned and ordered the victim off the porch. He then took her to an abandoned garage and killed her, shooting her in the chest and head. There was medical evidence that the victim had been beaten once or more during her captivity.

The defendant was arrested at his home that afternoon while he was washing the trunk of his car. Early the next morning he gave a statement that was transcribed by a

court reporter. In the statement, the defendant admitted to kidnaping, robbing and shooting the victim.

A number of the contentions of the defendant concern the constitutionality of the death penalty statute (Ill. Rev. Stat. 1977, ch. 38, par. 9—1). The issues raised have been decided adversely to him in recent holdings of this court, and there is no necessity of discussing them in detail now. This court has a number of times held that the grant of discretion to the prosecutor under the statute to ask for the death penalty is not unconstitutional. (*E.g., People v. Davis* (1983), 95 Ill. 2d 1, 28; *People v. Szabo* (1983), 94 Ill. 2d 327, 351.) Too, we have held that there is no unconstitutional vagueness in the statutory provision that the court sentence the defendant to death if the jury determines that "there are not mitigating factors sufficient to preclude the imposition of the death sentence" (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(g)), or in the provision that the absence of a "significant history of prior criminal activity" (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(c)(1)) is a mitigating factor. *People v. Lewis* (1981), 88 Ill. 2d 129, 144-46.

This court also has held that the sentencing standards in the death penalty statute, which provide for the weighing of mitigating factors against aggravating factors, do not offend due process. In *People v. Brownell* (1980), 79 Ill. 2d 508, 528-34, this court rejected a contention that the statute is constitutionally inadequate because it does not set out specific standards as to the weight to be given to the aggravating and mitigating factors. Because the sentencing process upheld in *Brownell* is a weighing process, we have judged that there is no need to impose a specific burden of proof upon the prosecution to show the absence of mitigating factors. (*People v. Free* (1983), 94 Ill. 2d 378, 421.) We have also rejected the contention that the statute is unconstitutional in permitting the jury to consider in the second phase of the sentencing proceeding nonstatutory aggravating factors (*People v. Kubat* (1983), 94 Ill. 2d 437, 504), and we have distinguished *Henry v. Wainwright* (5th Cir. 1981), 661 F.2d 56, *cert. allowed and cause remanded* (1982), ____ U.S. ____, 73 L. Ed. 2d 1326, 102 S. Ct. 2922, which the defendant here cites for his argument to the contrary. *People v. Davis* (1983), 95 Ill. 2d 1, 38; *People v. Free* (1983), 94 Ill. 2d 378, 427.

Too, we have rejected the argument that the sentencing scheme is defective in failing to provide procedures for comparative review. That review would entail providing for

the collection of data in all murder cases in this State for a comparison between cases in which the death penalty has been imposed and those in which it was not. (*People v. Kubat* (1983), 94 Ill. 2d 437, 502-04.) Further, we have judged that the statute does not violate article I, section 11, of the Illinois Constitution (Ill. Const. 1970, art. I, sec. 11), which provides that all penalties be determined in accordance with the seriousness of the offense and with the goal of restoring the offender to useful citizenship. *People v. Davis* (1983), 95 Ill. 2d 1, 28; *People v. Free* (1983), 94 Ill. 2d 378, 420-21; *People v. Szabo* (1983), 94 Ill. 2d 327, 351; *People v. Gaines* (1981), 88 Ill. 2d 342, 380-82.

The defendant also contends that his rights under the sixth amendment (U.S. Const., amend. VI) were violated by the trial judge's refusal to allow him to serve as co-counsel. Prior to entering the plea of guilty, the defense presented a motion asking that the defendant be allowed to serve as co-counsel at trial. The defendant said that he wanted "to represent [himself] with counsel." According to his attorney, the defendant desired to conduct some parts of the trial himself. He did not want to appear *pro se* with a lawyer in an advisory role. The court denied the motion and required the defendant to choose between representing himself or being represented by counsel. The defendant chose to have counsel represent him.

The State contends that this question is moot and has been waived, because the defendant did not go to trial. He pleaded guilty. Whether the issue is moot or not it is clear that it has no merit. In *People v. Ephraim* (1952), 411 Ill. 118, a defendant claimed that his right to defend himself *pro se* was denied by a judge's appointment of counsel in his behalf. The trial court had initially granted the defendant leave to conduct his own defense when the public defender who had been representing him withdrew from the case. Later, however, the trial court, on its own motion, appointed counsel, who represented the defendant at pretrial hearings, at trial, and in post-trial motions.

This court's review of the record showed that the defendant had accepted counsel without making any objection. The acceptance of counsel, this court judged, was a waiver of the right to appear *pro se*. It explained:

> "An accused has either the right to have counsel act for him or the right to act himself. As pointed out in *United States v. Mitchell* [(2d Cir. 1943), 137 F.2d 1006], it is obvious that both of those rights cannot be exercised at

the same time. It follows that to allow a defendant to avail himself to the hilt of his right to counsel, then allow him to plead his right to defend himself when the trial conducted by counsel produces an unsatisfactory result, would give far too great a chance to delay trial and to otherwise embarrass effective prosecution of crime. (See *United States v. Gutterman* [(2d Cir. 1945), 147 F.2d 540].) As indicated in the *Mitchell* case, a defendant must be required to make his election between the two rights at the proper time and in the proper manner." *People v. Ephraim* (1952), 411 Ill. 118, 122.

There is no reason to depart from the holding in *Ephraim* that a defendant has no right to both self-representation and the assistance of counsel. Federal courts have held that no such right exists under the United States Constitution (*United States v. Halbert* (9th Cir. 1981), 640 F.2d 1000, 1009; *United States v. Daniels* (5th Cir. 1978), 572 F.2d 535, 540), and the provision in our constitution regarding the right of self-representation and the assistance of counsel is identical in relevant part to the corresponding provision in the constitution in effect when *Ephraim* was decided. Compare Ill. Const. 1970, art. I, sec. 8, with Ill. Const. 1870, art. II, sec. 9.

The defendant argues that his plea of guilty was not entered voluntarily and intelligently. Due process requires that a plea of guilty not be accepted unless it appears from the record that the plea was made knowingly, intelligently and voluntarily. (*Boykin v. Alabama* (1969), 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709.) To satisfy the requirements of due process, our Rule 402 (73 Ill. 2d R. 402) provides in part:

"In hearings on pleas of guilty, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted

with the witnesses against him."

The defendant contends that his right to due process was violated because when he entered his plea of guilty he "did not and could not have known the maximum penalty that his plea could subject him to."

This contention is simply not supported by the record. At the time the defense announced that the defendant wanted to change his initial plea of not guilty to guilty, the court informed the defendant of the charges against him. The court then said: "I must advise you further that you can be tried before this court or before a jury. If you are found guilty of murder, under the circumstances of which case [*sic*] the death penalty could be imposed." The court also informed the defendant of the prison terms he could be given for the other offenses.

The prosecutor requested, "I ask that the defendant also be admonished as to the amount of years he could get on the charge of murder and that he might be eligible for a life imprisonment in addition to the death penalty, your Honor, as a possible penalty ***." The court then stated, "I must also advise you [that] in addition to the possibility of the death penalty under the Code as it exists in the State of Illinois, there is a further provision for the imposition of sentence for the crime of murder wherein it is provided the minimum term to be imposed shall be not less than 20 years and not more than 40 years." The court advised the defendant that by pleading guilty he was waiving his right to have a jury determine the question of guilt. The defendant signed a waiver stating that he was foregoing his right to a jury trial and that he was pleading guilty to the charges.

It is clear that the defendant was advised of the possibility that the death penalty could be imposed. The defendant contends that the judge's language admonishing him that he could receive the penalty after being found guilty of murder implied that the death penalty could be imposed only after a trial, not upon a plea of guilty. This contention is not convincing. An admonition of the court must be read in a practical and realistic sense. The admonition is sufficient if an ordinary person in the circumstances of the accused would understand it to convey the required warning. (*People v. Krantz* (1974), 58 Ill. 2d 187, 193; *People v. Doyle* (1960), 20 Ill. 2d 163, 167.) The defendant could not reasonably have understood that by waiving the determination of guilt by the trial court or by a jury he would avoid

the imposition of the death penalty.

Moreover, there is no doubt that the defendant was aware that he was eligible for the death penalty even before he announced his intention to change his plea to guilty. Months before the plea of guilty was entered the defense filed a motion asking the State to disclose whether the death penalty would be sought. In open court, and in the presence of the defendant, the State answered that it need not make an announcement at that time. Too, on the morning that the plea of guilty was entered, the defense presented a written motion to compel disclosure of the aggravating factors the prosecution would introduce at a death penalty hearing. The defendant, prior to acceptance of his plea, acknowledged to the judge that his attorneys had informed him of the consequences of pleading guilty.

Another contention made by the defendant is that his sentence must be vacated because in reaching its verdict the jury relied upon an aggravating factor not in evidence. One of the statutory aggravating factors relied upon by the prosecution was that "the murdered individual was killed in the course of another felony." (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(b)(6).) The other factor relied upon was that "the murdered individual was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness or possessed other material evidence agninst the defendant." (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(b)(7).) Here, as he did in the trial court, the defendant contends that reliance upon the second factor should not have been permitted.

The defendant bases this argument upon *People v. Brownell* (1980), 79 Ill. 2d 508. There the defendant was found guilty of murder, aggravated kidnaping and rape, and was sentenced by the court. The court found that under the evidence two aggravating factors were present: (1) that the victim was killed in the course of two other felonies, (2) that the victim was an eyewitness against the defendant. Finding no mitigating factors to preclude the sentence of death, the court sentenced the defendant to death.

According to Brownell's written statement admitted at trial, the defendant had picked up the victim, Louise M. Betts, when she was hitchhiking. Armed with a knife, the defendant drove to an open area and raped the victim. The defendant then attempted to strangle her, but she was able

to get up and run from him. The defendant caught and strangled her.

This court judged that the second aggravating factor found by the court, that the victim was an eyewitness against the defendant, was not established. It pointed out that the trial judge apparently made the finding that the victim was an eyewitness simply on the ground that the victim could have later testified against the defendant as to the aggravated kidnaping and rape. This court explained that while the circumstances met the literal requirements of the aggravating factor, the General Assembly must not have intended that aggravating factor to be applied to such a case. The court said:

> "Otherwise, were we to adopt the trial court's finding, this aggravating factor could apply in every prosecution for murder where another offense contemporaneously occurs because the victim could have been a witness against the defendant. Or, even more broadly, this aggravating factor could apply to every prosecution for murder since every victim, obviously, is prevented from testifying against the defendant. We do not think the General Assembly intended the death penalty to be applied in every murder case, and, if it did, the General Assembly could certainly find a more direct way to express its intent than through this aggravating factor." (*People v. Brownell* (1980), 79 Ill. 2d 508, 526.)

This court concluded that the General Assembly must not have intended the aggravating factor to be applied to a victim who was, or who may be, a witness as to the offenses in the course of the murder. Instead, it must have been the legislature's intent "to include situations where, during an investigation or prosecution of a separate offense which has previously taken place, a witness is killed in an attempt to stymie the investigation or prosecution." 79 Ill. 2d 508, 526.

We think that the circumstances here are sufficiently different from those in *Brownell* to permit us to reach a different conclusion. Here, the evidence showed that after kidnaping and raping the victim, the defendant set her free with instructions to go directly home and not to call the police. She did not obey, however, and went to a house for help. The owner of the house told her he would call the police for her and he did so. The defendant was actually secretly watching her, and he then took her off and murdered her. The police were on their way to the scene in response to the resident's phone call at the time of the kill-

ing.

By his own admission, the defendant acted as he did because he knew Mrs. Goldstone was going to report the crimes to the police. A police investigator testified to a statement made by the defendant:

> "He said all right, that he would talk, that he didn't want to hurt Mrs. Goldstone, that he intended to leave her go, and that he in fact let her go on her promise that she would not got to the police. When he saw her go up to the door at 104th and Maryland, he realized there was no way that she wasn't going to go to the police."

In a statement transcribed by a court reporter, the defendant said:

> "I drove further up the way on the same street and I got out of my car and I walked around the corner on 104th Street and I could see up to the next corner, which is Maryland. I saw her on somebody's porch and she was talking to somebody, you know, call the police, you know, this and that, whoever she was talking to."

Under these circumstances, the jury could have found both that the murder was committed "in the course" of the other felonies, and that the victim was an eyewitness. There is no significant difference between the circumstances here and a situation in which a defendant kidnaps and rapes the victim, sets her free, and at a later time kills her while she is on her way to testify against him. The latter situation clearly is within this court's understanding of the statutue considered in *Brownell*. We do not see why the General Assembly would not have intended the circumstances here to be within the statutory factor. The legislature's clear concern, to protect persons who could assist in the apprehension and prosecution of the accused (see Remarks of Senator Knuppel, debate of amendment 3 to H.B. 10, 80th Gen. Assem., June 1, 1977, at 21-25), is served by such an interpretation.

The defendant's next argument concerns the State's exercise of peremptory challenges. Here the victim and most of the prosecution's witnesses were white and the defendant was black. According to a motion filed by the defendant to discharge the jury selected, 28 of the 130 prospective jurors examined and excused during the *voir dire* examination were black. Fifteen of the prospective black jurors were excused for cause on the State's motion and two were excluded for cause on the defendant's motion. The State used 11 peremptory challenges to exclude the other blacks.

The defendant argued in his motion that his rights under the sixth and fourteenth amendments were violated by the State's exercise of the peremptory challenges. He contends that the court erred by not requiring the prosecution to show a justification, as the defendant puts it, for the peremptory challenges other than that of race.

The defendant's briefs in this court in addition contain statements regarding the composition of 43 juries in recent capital cases in this State. Over half of the juries were all white. Most of the rest of the juries contained only one black. How many peremptory challenges were exercised by the defense and by the State is not indicated. There are no other materials to illustrate that the State has regularly and systematically through the exercise of peremptory challenges excluded blacks or other minorities in case after case. None of these materials, it would appear, were presented to the trial court.

In *People v. Davis* (1983), 95 Ill. 2d 1, we rejected a contention by the defendant that the State's exercise of peremptory challenges which resulted in an all-white jury deprived the defendant of a fair and impartial jury. We noted that the contention was contrary to *Swain v. Alabama* (1965), 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824, in which the Supreme Court held that an exercise of peremptory challenges which resulted in the selection of a jury composed of white jurors did not of itself show a constitutional violation. Under *Swain*, a constitutional issue of equal protection could not arise unless there was a systematic and purposeful exclusion of blacks because of race from juries in case after case. 380 U.S. 202, 223, 13 L.Ed. 2d 759, 774, 85 S. Ct. 824, 837.

We noted too in *Davis* that though two States have not followed *Swain* when interpreting provisions of their constitutions (*Commonwealth v. Soares* (1979), 377 Mass. 461, 387 N.E.2d 499, *cert. denied* (1979), 444 U.S. 881, 62 L. Ed. 2d 110, 100 S. Ct. 170; *People v. Wheeler* (1978), 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890), we would adhere to the Supreme Court's view.

The defendant here cites another decision, in which the exclusion of blacks through the use of peremptory challenges was held to be a violation of Federal constitutional law. That case, *People v. Payne* (1982), 106 Ill. App. 3d 1034, was decided by the third division of the First District of the appellate court. It was held that the use of peremptory challenges by the State to exclude blacks from a jury

during *voir dire* because they are black is a violation of the defendant's right to a jury drawn from a fair cross section of the community. The *Payne* court relied upon *Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692, in which the Supreme Court held that it is fundamental to the sixth amendment guarantee of an impartial jury that "the defendant in a criminal trial [have] the opportunity to have the jury drawn from venires representative of the community." (419 U.S. 522, 537, 42 L. Ed. 2d 690, 702, 95 S. Ct. 692, 701.) The court in *Taylor* judged that the Louisiana jury system violated this fair-cross-section requirement because under the system a woman would not be selected for jury service unless she had previously filed a written declaration expressing her desire to serve as a juror, which system resulted in women being called for jury service in grossly disproportionate numbers considering the number of eligible women in the community.

The court in *Payne* believed that the use of peremptory challenges in particular cases to exclude members of any discrete group because of their group affiliations also was invalid, because otherwise "the constitutional right to a jury drawn from a fair cross section of the community could be rendered a nullity through the use of peremptory challenges." (*People v. Payne* (1982), 106 Ill. App. 3d 1034, 1037.) The *Payne* court said that *Swain* was not controlling in the circumstances because in *Swain* the defendant's challenge was based upon the equal protection clause in the fourteenth amendment, not upon the sixth amendment. The *Payne* court noted that *Swain* was decided before the Supreme Court held that the sixth amendment rights relating to jury trials were applicable to the States, and before the court in *Taylor* held that the fair-cross-section requirement was a guarantee of the sixth amendment. 106 Ill. App. 3d 1034, 1040-43.

The division of the appellate court that decided *Payne* has followed its decision in subsequent cases. (*People v. Gilliard* (1983), 112 Ill. App. 3d 799; *People v. Gosberry* (1982), 109 Ill. App. 3d 674.) *Payne* has been considered and rejected, however, by two other divisions of that court. *People v. Newsome* (1st Dist., 2d Div. 1982), 110 Ill. App. 3d 1043; *People v. Teague* (1st Dist., 1st Div. 1982), 108 Ill. App. 3d 891.

Payne does not satisfactorily meet the questions which must be addressed in considering the problem.

The Supreme Court in *Swain* concluded that the importance of the peremptory challenge in obtaining an unbiased jury justified its use in particular cases against members of individual groups based on their group affiliations. The court stated:

> "In providing for jury trial in criminal cases, Alabama adheres to the common-law system of trial by an impartial jury of 12 men who must unanimously agree on a verdict, the system followed in the federal courts by virtue of the Sixth Amendment. As part of this system it provides for challenges for cause and substitutes a system of strikes for the common-law method of peremptory challenge. Alabama contends that its system of peremptory strikes—challenges without cause, without explanation and without judicial scrutiny—affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial. This system, it is said, in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes. Based on the history of this system and its actual use and operation in this country, we think there is merit in this position." *Swain v. Alabama* (1965), 380 U.S. 202, 211-12, 13 L. Ed. 2d 759, 767-68, 85 S. Ct. 824, 831.

The court then traced the history of the peremptory challenge and found that it had "very old credentials." (380 U.S. 202, 212, 13 L. Ed. 2d 759, 768, 85 S. Ct. 824, 831.) Its function, the court explained, is to eliminate extremes of partiality on both sides and to assure the parties that the jurors will decide the case on the evidence alone. The availability of peremptories, the court pointed out, permits counsel to ascertain the possibility of bias through probing questions at *voir dire*, and it removes the fear of arousing a juror's hostility through examination and challenge for cause. The court also noted that "[a]lthough historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' " 380 U.S. 202, 220, 13 L. Ed. 2d 759, 772, 85 S. Ct. 824, 835, quoting *Hayes v. Missouri* (1887), 120 U.S. 68, 70, 30 L. Ed. 578, 580, 7 S. Ct. 350, 351.

The court concluded:

> "The essential nature of the peremptory challenge is

that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. *** It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another' [citation], upon a juror's 'habits and associations' [citation], or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment' [citation]. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the *voir dire*, by both prosecutor and accused [citations]. This Court has held that the fairness of trial by jury requires no less. [Citation.] Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. ***

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." 380 U.S. 202, 220-22, 13 L. Ed. 2d 759, 772-73, 85 S. Ct. 824, 836-37.

We consider that the authority of *Swain* was not lessened because of the recognition of a sixth amendment fair-cross-section requirement in *Taylor v. Louisiana* (1975), 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692. The court in *Taylor* held that it is fundamental to the sixth amendment right to a jury trial that the selection of a petit jury be from a representative cross section of the community. The issue, as the court put it, was, "whether the presence of a fair cross section of the community on venires, panels,

or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions." 419 U.S. 522, 526, 42 L. Ed. 2d 690, 696, 95 S. Ct. 692, 696.

There was no retreat in the *Taylor* opinion from the view that it is an essential part of our system of trial by an impartial jury that both sides be allowed in particular cases to exercise peremptory challenges on any ground they select. It appears that the complaint addressed in *Taylor* is the systematic exclusion of a group from the jury system, not from any particular jury. This is in harmony with the suggestion in *Swain* that the systematic exclusion of blacks by peremptory challenges in case after case regardless of the particular circumstances involved would raise a constitutional issue. (380 U.S. 202, 223, 13 L. Ed. 2d 759, 774, 85 S. Ct. 824, 837.) Moreover, the limited character of the *Taylor* holding is clear from the following statement, which appears at the conclusion of the opinion:

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition [citation]; but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." 419 U.S. 522, 538, 42 L. Ed. 2d 690, 702-03, 95 S. Ct. 692, 702.

The Court of Appeals of New York recently rejected a request that it no longer follow the holding of the Supreme Court in *Swain*. The court made clear its understanding that the holding in *Swain* had not been affected by *Taylor*:

> "The issue of minority representation on criminal juries has been the subject of several decisions by the Supreme Court. These decisions draw a critical distinction between the jury pool, which is the group of prospective jurors from which the litigants will select a jury to hear their particular case, and the jury that is ultimately chosen to serve. The Sixth Amendment requires that the jury pool be selected from a representative cross section of the community (*Taylor v. Louisiana* [(1975)], 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692), and distinctive groups in the community may not be systematically excluded from the pool. Once the jury pool is selected, however, prospective jurors may then be excluded through

the exercise of cause challenges and peremptory challenges." (*People v. McCray* (1982), 57 N.Y.2d 542, 545, 443 N.E.2d 915, 916-17, 457 N.Y.S.2d 441, 442-43.)

Even the court in *People v. Wheeler* (1978), 22 Cal. 3d 258, 284-85, 583 P.2d 748, 767, 148 Cal. Rptr. 890, 908, which we referred to earlier, recognized that if the Supreme Court were presented with the issue we are considering in terms of the sixth amendment fair-cross-section requirement, the court probably would not decide the question differently than it did in *Swain*.

Parenthetically, we would observe that since it was followed in *Commonwealth v. Soares* (1979), 377 Mass. 461, 387 N.E.2d 499, *Wheeler* has been followed in few instances. (*E.g., State v. Crespin* (1980), 94 N.M. 486, 612 P.2d 716.) Most courts have declined to follow it (*State v. Stewart* (1979), 225 Kan. 410, 591 P.2d 166; *Laurence v. State* (1982), 51 Md. App. 575, 444 A.2d 478; *State v. Sims* (Mo. Ct. App. 1982), 639 S.W.2d 105; *Commonwealth v. Henderson* (1981), 497 Pa. 23, 438 A.2d 951; *State v. Ucero* (1982), ___ R.I. ___, 450 A.2d 809; *State v. Grady* (1979), 93 Wis. 2d 1, 286 N.W.2d 607; see *People v. McCray* (1982), 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (not mentioning *Wheeler* but rejecting the *Wheeler* approach); *cf. Dorpel v. United States* (D.C. 1981), 434 A.2d 449, *cert. denied* (1981), 454 U.S. 1037, 70 L.Ed. 2d 483, 102 S. Ct. 580 (judging *Swain* dispositive)). Two of the courts expressly criticized *Wheeler* as effectively eliminating the peremptory challenge as a useful tool in assuring an impartial jury: *Commonwealth v. Henderson* (1981), 497 Pa. 23, 438 A.2d 951; *State v. Grady* (1979), 93 Wis. 2d 1, 286 N.W.2d 607.

There has been criticism of the reasoning of the *Wheeler* court. (See S. Saltzburg & M. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 359-60 (1982).) It has been observed that *Wheeler* "has found surprisingly little support" and that "the overwhelming majority of courts still apply *Swain's* systematic exclusion test." Comment, *The Sixth Amendment: Limiting the Use of Peremptory Challenges*, 16 J. Mar. L. Rev. 349, 358 (1983).

Another contention of the defendant is that there was error in the excusing for cause of certain jurors. In *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, the Supreme Court held that prospective jurors could not be excused for cause simply because

they had scruples against the infliction of the death penalty, or voiced general objections to capital punishment. The court did not hold improper, however, the exclusion of jurors who made it clear that they would automatically vote against the imposition of the death penalty regardless of evidence presented to them. The Supreme Court has not deviated from the rule in *Witherspoon*. The State can "exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths." *Adams v. Texas* (1980), 448 U.S. 38, 48, 65 L. Ed. 2d 581, 592, 100 S. Ct. 2521, 2528.

The defendant claims that the exclusion of 12 prospective jurors was in violation of *Witherspoon*. Our review of the record satisfies us that none of those jurors was excluded simply for expressing general objections to the death penalty.

Contrary to the defendant's contentions, the exclusion of four of the 12 jurors had no reference to the death penalty. Mrs. Jean Samp was not challenged by the State; she was excused at her own request. She believed in capital punishment but she told the court that she had a strong unwillingness to play God as a juror. She said that she honestly felt that she could not be an unbiased juror, and that she would be partial to one side. The court excused her after ascertaining that she could not lay aside her personal opinions and render an impartial verdict on the evidence. Clearly a trial court can excuse a juror who states that she cannot be impartial. *E.g., People v. King* (1973), 54 Ill. 2d 291.

Lucila Kentris was excused not because of scruples against the death penalty; but because the court judged that she lacked capacity to understand her duties as a juror. She gave contradictory answers, and insisted that she would presume that the defendant was innocent despite his plea of guilty. The prospective juror's obvious confusion during questioning justified the court's statement, "I am not aware that she understood any of anyone's questions, *** [or] the nature of the proceedings, despite the fact that it was explained to her by each attorney and by the court, and I'm not aware whether or not she comprehended what was occurring."

Joan Carter was also excused for reasons other than her feelings as to the death penalty. She was not asked about her attitude in that respect. She did state, though, that she did not know whether she could apply the law as

instructed in instances where she disagreed with the law. If the law conflicted with her "inner feelings," she said, she would follow her feelings.

Another juror, Lovell Wilkinson, was excused after stating that he could not fairly and impartially serve as a juror. He, in fact, believed in the death penalty, but was upset that it was not applied in every murder case after a finding of guilt.

The restriction upon the exclusion of jurors expressed in *Witherspoon* was not applicable to the above-named jurors. *Witherspoon* does not prohibit the exclusion of jurors who state that they will not be able to follow the law and render an impartial verdict based on the evidence. *Adams v. Texas* (1980), 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521.

The other jurors were properly excluded for cause. They did express views against capital punishment that would require them, they said, to vote against the death penalty whatever the evidence presented to them might be. Hereafter is the relevant interrogation of these jurors.

Juror Phillip Smith:

"Q. [Prosecutor]: Okay, do you have any conscientious or religious scruples against the imposition of the death penalty, sir?

A. Yes, I do.

Q. You will be against applying that, is that correct?

A. Yes.

Q. No matter what the evidence says, in other words, right?

A. Yes.

• • •

Q. [Defense Counsel]: Mr. Smith, the attitude you have about the death penalty, is that to the extent that any kind of a case, no matter how severe or how brutal it is?

A. Yes.

• • •

Q. [Defense Counsel]: Can you think of any crime that may come out of the neighborhood that you live in that may be so brutal that the death penalty might be appropriate?

A. No."

Juror Lois Marquez:

"Q. [Prosecutor]: *** Do you, sir, have any conscientious or religious scruples against the imposition of the death penalty in a proper case?

A. I don't believe in capital punishment.

• • •

Q. [B]ecause of your belief, do you believe that you could never impose capital punishment?

A. I don't think I could.

• • •

Q. So what you are saying is that no matter what evidence would be shown to you, you couldn't impose the death penalty, yes or no?

A. No, I couldn't."

Juror William A. Occomy told defense counsel that he did not consider that he was qualified to serve as a juror in a sentencing proceeding.

"Q. [Defense Counsel]: *** [C]an you promise me that you will follow the law as the judge instructs you to do so and can you put aside the feeling that this decision is one that makes you certainly uncomfortable, one that you would prefer not to do?

A. Frankly speaking, no.

Q. You don't feel you can follow the law as the judge gives it to you?

A. Frankly, well, let me put it this way, I guarantee you now, my name will never be on that piece of paper for a death verdict."

Juror Ruthie Norwood:

"Q. [Prosecutor]: All right, do you have any feelings with respect to capital punishment?

A. I don't believe in it.

• • •

Q. Okay; are your feelings of the type that no matter what the evidence in the case showed, you would not be able to vote for capital punishment?

A. Right, I wouldn't.

• • •

Q. [Defense Counsel]: Mrs. Norwood, are you saying that in any case, no matter how extreme, you would not even consider the imposition of the death penalty?

A. I just don't believe in it."

Juror Vincent Ross, a minister, had religious scruples against the death penalty.

"Q. [Prosecutor]: *** [I]s [your religious belief] such that you feel you could not be in a position to sign a verdict that would mandate somebody's death?

A. No, I could not.

Q. No matter what the facts are, when it came right down to it, when they slid the piece of paper over to you, you would't be able to sign it, would you?

A. No.

• • •

THE COURT: Now, this stage before the trial has

begun, are you stating that you would not sign a verdict form mandating the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings?

• • •

Is that what you're saying, sir?
THE WITNESS: Yes."

Juror Francis Murray remembered reading about the murder in a newspaper article. In regard to the death penalty issue he said:

"Q. [Defense Counsel]: Mr. Murray, if a verdict form was handed to you that dictated that the death penalty should be applied and you thought the case was a proper one, it should be applied, would you sign such a verdict?

A. I don't think I can live with it.

Q. Do you have—do you feel the death penalty is in fact warranted in a proper case?

A. I don't believe in the death penalty.

Q. Is this belief that you have in the death penalty based upon a religious or moral feeling?

A. It's a moral feeling.

• • •

Q. [Defense Counsel]: When you tell us, Mr. Murray, that you do not believe in the death penalty, are you saying to us that you do not believe the death penalty is ever applicable in any kind of case?

A. No, I don't believe I could judge anybody in a life and death situation. I couldn't."

Juror Mary Lou Hill, after being somewhat vague as to the death penalty in response to questioning by defense counsel, said:

"Q. Do you feel that you would be capable of signing a verdict that would warrant the death penalty in any case?

• • •

A. I think that would be very hard for me to do.

Q. [Prosecutor]: No, that's an equivocal statement. Could you or could you not?

A. The way I feel now, no.

• • •

THE COURT: Ma'am, regardless of the facts and circumstances that might emerge during the course of this hearing, are you, irrevocably, committed before the hearing has begun, to vote against the death penalty?

A. Your Honor, I don't believe in the death penalty.

• • •

Q. Well, then you would answer that question how, yes or no?

A. Would you repeat that question again?

Q. Regardless of the facts or circumstances that might emerge in the course of the proceedings in this case, by you now— are you irrevocably committed against— before the hearing— the death penalty and not to sign a verdict form if that verdict form would mandate?

A. Yes.

Q. That is your opinion right now?

A. Yes."

The parties disagree whether Delores Hudson was excused because of her views against the death penalty. We consider from an examination of the record that she was excused for this reason, but in any event, any possible error in regard to *Witherspoon* was waived. During questioning by defense counsel she stated:

"Q. *** [D]o you have any questions you have to ask me, at this point, about the procedure about what we are about— about what's going to happen in the situation, if you are selected as a juror?

A. Not really, but I would like to say one thing, and I don't know if I has a right to ask, but I have a feeling about the electric chair.

Q. What feelings do you have?

A. I don't like it.

Q. You don't like the electric chair? Miss Hudson, do you feel that in certain cases— or can you conceive of the situation where the death penalty would be an appropriate punishment?

A. I— I— I was always taught thou shall not kill, and I would feel, you know, I would sit there and—no matter what this person done, you know, to me, and I will sit there and write down that the death penalty, and I don't believe in it, you know, killing anybody, and that would be a burden on me, that my vote was in there to do this action, and I don't believe in it, you know.

Q. Well, let me ask you this.

[Prosecutor]: Cause.

[Defense Counsel]: May I—

[Prosecutor]: Motion for cause.

THE COURT: Motion for cause is overruled. Counsel, there is a motion for cause.

[Defense Counsel]: Fine, Judge. May I continue questioning or is the Court going to rule on it this moment?

[Prosecutor]: I think it's sufficient right now. The lady stated, without leading questions, what her feelings are.

[Defense Counsel]: Your Honor, I am questioning, at this point, or is [the prosecutor].

[Prosecutor]: I made my motion, Judge.

[Defense Counsel]: Your Honor, Judge, I am sure you

heard [the State's Attorney]. I am sure you heard [the State's Attorney]. He doesn't have to repeat himself.

THE COURT: I think [the prosecutor] has a right—

[Defense Counsel]: After we are done, of course.

THE COURT: All right. Let us move on post haste.

• • •

Q. I am going to try and complete the question, if I am able to.

The State is going to be seeking the death penalty against my client. Would you be able to wait and listen to here [*sic*] all the evidence before you make your decision on whether or not the death penalty should be applied?

[Prosecutor]: Object.

THE COURT: She may answer.

A. THE JUROR: Well, just like I told you, I don't believe in the death chair, so—

[Defense Counsel]: I have no further questions, Judge.

THE COURT: You may step down, ma'am. Thank you.

(Juror is excused)"

In regard to this juror, it is argued that the trial court denied, not allowed, the motion for cause because of her attitude toward the death penalty. While the court at one point in the above excerpt did say that the motion was denied, it is obvious it was a tentative or nonfinal ruling to permit the questioning by the defense to continue. The court kept the question open and the defense questioning continued. The court's final ruling came after the defense had concluded its questioning. The court recessed, and upon resuming the proceeding stated that she had been excused for cause.

The defense noted an objection to her exclusion for the record, but the ground of the objection was not that she was being excluded in violation of *Witherspoon*. The stated ground of the objection was that the defense did not have a sufficient opportunity to question the prospective juror. A specific objection, of course, waives all grounds not stated. (*Town of Cicero v. Industrial Com.* (1950), 404 Ill. 487, 495; E. Cleary & M. Graham, Illinois Evidence sec. 103.2, at 6 (3d ed. 1979).) The defendant does not assert the "insufficient opportunity" ground here.

The defendant says that as to these jurors, the court did not use the precise language of the *Witherspoon* test of exclusion for cause. Our decisions have stressed, however, that we must look to the substance of the answers given, not simply to whether the form of the questions and an-

swers matched the pattern described in *Witherspoon*, and we recognize the superior position and opportunity of the trial judge to ascertain a juror's meaning. (*People v. Free* (1983), 94 Ill. 2d 378, 402-03; *People v. Kubat* (1983), 94 Ill. 2d 437, 499.) As this court observed in *People v. Gaines* (1981), 88 Ill. 2d 342, 356: "[I]t is appropriate to point out that the distinction drawn in *Witherspoon* between a venireman's general opposition to the death penalty and his unwillingness to vote for its imposition is a sophisticated one which a prospective juror may not readily grasp. While it is the duty of the trial judge to propound the key questions in a form which will be understood and with enough specificity to admit of an unambiguous response, we do not read *Witherspoon* as prescribing a set catechism, or as requiring a venireman to express himself with meticulous preciseness."

The defendant also complains that a photograph of the victim taken by her husband was highly prejudicial and should not have gone to the jury room at the stage of the proceeding when the jury was deliberating whether to impose the death penalty. During the first stage when it was being determined whether the defendant's conduct had made him liable for the death penalty, the State asked to have the portrait photograph sent into the jury room. A defense objection was sustained on the ground that the photograph might excite sympathy for the victim from the jury and that it did not accurately portray the victim's appearance immediately prior to the crime.

During the second stage of the sentencing hearing, the defendant testified under cross-examination in part:

"Q. Did you notice any changes in her physical condition?

A. Not at that time, no.

Q. Did you notice any bruises on her face?

A. I don't recall looking for any bruises.

Q. You don't recall looking for any? Hernando Williams, how many times did you hit Linda Goldstone in the face?

A. I don't recall hitting her in the face at all.

Q. You don't recall?

A. No, I do not.

Q. Did you hit her at all during the whole 36-hour period of time that you held her in captivity?

A. I could have.

Q. You could have?

A. That's right.

Q. Well, did you see the photographs that the jury

saw of the body of Linda Goldstone, her face, showing the bruises?

A. No, I did not see the photographs.

Q. Well, didn't you notice any—at the time that you let her off, did you notice any bruises on her face?

A. No, I don't remember.

Q. You don't remember. Well, did she look the same, Mr. Williams, as when you first picked her up?

A. No, she didn't look the same."

After being shown the lifetime photograph of the victim, the defendant was asked:

"Q. [I]s that the way she looked when you picked her up?

A. (No response.)

Q. Her face?

A. Yes.

Q. And there was quite a change, wasn't there, from the time that you let her off, right?

A. There had been some changes, yes."

A photograph of the victim's body at the scene of her murder was sent to the jury room during the second stage of the hearing along with the portrait photograph. The defendant argues that if the portrait photograph was considered prejudicial at the first stage, it should have been inadmissible at the second stage as well.

It is clear that photographic evidence having a natural tendency to establish the facts in controversy is admissible. (*People v. Foster* (1979), 76 Ill. 2d 365; *People v. Speck* (1968), 41 Ill. 2d 177; *People v. Jenko* (1951), 410 Ill. 478.) In *People v. King* (1963), 29 Ill. 2d 150, 154, we said:

> "All evidence concerning 'the physical facts and circumstances showing a killing are admissible in evidence as tending to throw light on the transaction and to reveal the nature' of the crime. [Citation.] Also all facts of the crime which show the aggravated nature of the offense are relevant to the punishment to be set by the jury."

The life or portrait photograph was admissible at the second stage to evidence the beating inflicted by the defendant. The medical examiner had testified that there were numerous marks and bruises on the victim's body, including her face. The defendant testified that when he picked up the victim she looked as she did in the portrait photograph. The photographs considered together showed the condition of the victim before and after the defendant's criminal conduct. The photographs are particularly relevant in light of the defendant's professed inability to remember whether he struck the victim.

"[Q]uestions relating to the character of the evidence offered, and the manner and extent of its presentation, are largely within the discretion of the trial judge, and the exercise of that discretion will not be interfered with unless there has been an abuse to the prejudice of the defendant." *People v. Jenko* (1951), 410 Ill. 478, 482; *People v. Foster* (1979), 76 Ill. 2d 365, 376; *People v. Nicholls* (1969), 42 Ill. 2d 91.

Following his arrest, the defendant signed a 30-page written statement in which he confessed to the crimes charged and generally admitted the facts set out above. The trial court, after a pretrial hearing, found that the statement was voluntarily made. During the first phase of the sentencing hearing, each juror was given a copy of the statement over the defendant's objection, so the jurors could read along as the statement was read into the record by one of the prosecuting attorneys. The defendant admits that either method of communicating is proper, but contends that the use of both methods resulted in overemphasis of the defendant's statement, which violated the defendant's right to due process. The overemphasis was aggravated, the defendant says, by the fact that the statement went to the jury room during deliberations.

Although the defendant acknowledges in his brief that it is within the trial court's sound discretion to determine what documentary evidence shall be sent to the jury room (*People v. Caldwell* (1968), 39 Ill. 2d 346), he cites *People v. Spranger* (1924), 314 Ill. 602, for the proposition that it is improper to allow a defendant's written statement to go with the jury during deliberations. In *Caldwell*, which overruled *Spranger* to the extent it was contrary, this court said:

> "*Spranger*, however, did *not* hold that it was reversible error to permit the defendant's confession to go to the jury room. ***
>
> We think it significant that every criminal conviction in Illinois since 1924 wherein the taking of a written confession to the jury conference room was claimed as reversible error has been factually distinguished from *Spranger* on appeal and affirmed." (39 Ill. 2d 346, 356-57.)

Whether evidentiary items should be taken to the jury room rested with the discretion of the trial court, whose decision will not be disturbed absent the showing of an abuse of discretion to the prejudice of the defendant. (*Peo-*

ple v. Greer (1980), 79 Ill. 2d 103; *People v. Magby* (1967), 37 Ill. 2d 197.) There was no abuse of discretion here.

In *People v. Willy* (1921), 301 Ill. 307, which is cited by the defendant, it was said: "To permit counsel to read to the jury from the transcript written up by the shorthand reporter or from the attorney's own memorandum would tend to over-emphasize the testimony of the witness which is thus re-read." (301 Ill. 307, 328.) The excerpt is not in point. Unlike in *Willy*, there was no testimony here by the defendant and no re-reading of it to the jury. The jurors were provided copies of the statement so they could follow it as it was being read to them. The statement was quite lengthy. The events described covered a period of three days and involved several locations. The copies were collected from the jurors after the statement had been read into the record. As we stated above in our discussion of the photographs admitted into evidence, the manner and extent of the presentation of evidence are largely within the discretion of the trial court. *People v. Foster* (1979), 76 Ill. 2d 365; *People v. Jenko* (1951), 410 Ill. 478.

In any event, certainly it was not reversible error to give a copy of the statement to each juror. The defendant's guilt was not at issue and most, if not all, of the facts in the statement were independently verified. The jurors were later properly allowed to take the statement to the jury room, where they had the opportunity to read it. There was no substantial prejudice simply because the jurors had an earlier opportunity to read the confession.

The defendant also contends that he was deprived of his sixth amendment right to assistance of counsel by the introduction of testimony from a former law clerk who had appeared for him at a hearing on charges of earlier criminal conduct.

The defendant, with the victim bound and locked in the trunk of his car, appeared in court in Maywood on March 31, 1978, on pending charges for the aggravated kidnaping, rape, and armed robbery of Aline Krone. Kevin Breslin was a law student when under our Rule 711 (73 Ill. 2d R. 711) he appeared in court on behalf of the defendant. Breslin, who had never met the defendant before, conversed with Williams before approaching the bench, at which time the State requested and received a continuance.

At the trial for the crimes against Linda Goldstone, the defendant moved to bar Breslin's testimony on the ground that his testimony was a violation of the attorney-client

privilege. The character of the privilege is illustrated in Disciplinary Rule 4—101 (87 Ill. 2d R. 4—101). It provides, in part:

> "(a) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing to or would likely be detrimental to the client.
>
> (b) Except when permitted under Rules 4—101(c) and (d), a lawyer shall not knowingly, during or after termination of the professional relationship to his client:
>
> (1) reveal a confidence or secret of his client;
>
> (2) use a confidence or secret of his client to the disadvantage of the client; or
>
> (3) use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

The motion was denied and Breslin testified as to Williams' demeanor during their March 31, 1978, meeting. It was Breslin's testimony that Williams appeared articulate, well-dressed, calm and quite normal. Breslin did not relate the content of his conversation with the defendant, except to state that the defendant responded when Breslin called his name and told Breslin the nature of his father's business.

Although the attorney-client privilege does not usually extend to communications with a law student (8 Wigmore, Evidence sec. 2300 (McNaughton rev. ed. 1961)), Breslin was a person authorized under our Rule 711 to appear in court for limited purposes. As such, we will consider for purposes of this argument that he was acting as Williams' legal representative in the place of a licensed attorney and assume that the privilege extended to secrets or confidential communications between Breslin and the defendant.

The essential elements for the creation and application of the attorney-client privilege have been defined as follows:

> " '(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.' 8 Wigmore, Evidence, sec. 2292 (McNaughton Rev. 1961)." (*People v. Adam* (1972), 51 Ill. 2d 46, 48.)

The purpose of the privilege is to promote the free flow of

communication between attorneys and their clients by removing the fear of a compelled disclosure of confidential information. (*Taylor v. Taylor* (1977), 45 Ill. App. 3d 352; 8 Wigmore, Evidence sec. 2291 (McNaughton rev. ed. 1961).) The privilege "is based upon the confidential nature of such communications." *People v. Speck* (1968), 41 Ill. 2d 177, 200.

We consider that the defendant was not prejudiced by Breslin's testimony. The defendant's appearance and demeanor were not confidential communications. They were subject to be observed by anyone present in the courtroom. In fact, Joseph Kazmierski, one of the prosecutors in the Krone rape trial, also testified at Williams' murder trial concerning his demeanor at the March 31, 1978, hearing. A defendant's voluntary disclosure of information or other matters subject to being testified to in the presence of opposing counsel or any other third person who is not the agent of the defendant or his attorney is not privileged. (*People v. Werhollick* (1970), 45 Ill. 2d 459; *People v. Ryan* (1964), 30 Ill. 2d 456.) The defendant argues that although other people may have observed him at the same time as Breslin, only Breslin could really testify to his demeanor. Breslin's personal impression of Williams' appearance, however, cannot be said to relate to "legal advice from a professional legal adviser in his capacity as such." (See 8 Wigmore, Evidence sec. 2292 (McNaughton rev. ed. 1961).) In merely observing the defendant as a person in the courtroom, Breslin was not acting in a representative capacity.

Nor was the defendant prejudiced by Breslin's disclosure that Williams had related the nature of his father's business and that Williams had responded to his name. As a general rule the attorney-client privilege does not extend to the identity of an attorney's client unless he would be prejudiced in some substantial way. (*People v. Doe* (1977), 55 Ill. App. 3d 811.) Since Williams pleaded guilty, his identity was not in issue and he was not prejudiced by Breslin's remark that he had responded to the calling of his name. Breslin did not disclose the nature of the elder Williams' calling, but only that he had been informed of it by the defendant. This information could not prejudice Williams.

After the defendant pleaded guilty, he orally and in writing requested a presentence investigation. During the second phase of the sentencing hearing, that is, the phase

to determine whether the death sentence should be imposed, Edward Swies, a probation officer who had conducted the presentence investigation, was called as a witness by the State. The defendant objected to his taking the stand. It was his contention that any conversation between him and the witness was privileged and that the witness' testimony would violate his fifth amendment right to remain silent. These objections were overruled.

During direct examination, there was this colloquy:

"People: And let me call your attention in this particular case to October 10th of this year. Do you recall on that day beginning your presentence investigation in regard to the defendant, Hernando Williams?

A. Yes, I do.

Q. Did you meet with Hernando Williams on October the 10th?

A. Yes, I did.

Q. And that was the day after he entered his plea of guilty?

A. Yes.

• • •

Q. Did you inquire of Hernando Williams when you met with him in regard to any military record that he may have had?

A. Yes, I did.

Q. Did you learn from him anything about that military record?

A. Yes.

Q. What did you learn from him?

A. He stated to me that he enlisted into the United States National Guard and that he had received an honorable discharge.

• • •

Q. During the course of this interview which you had on the 10th of October, was there any opportunity given by you or was there an opportunity given by you to the defendant to him to say anything that he wished to say to you?

A. Yes.

Q. In regards to this investigation?

A. Yes, there is.

Q. Did you at that time ask the defendant if he wished to make any comment with regard to the case involving Linda Goldstone?

(Objection overruled)

Q. Let me specify. That was with regard to the case in which he had just already pled guilty, correct?

A. Yes.

Q. Did you ask him how he felt about what had hap-

pened in this case.

A. Yes, I did.

Q. How his wife felt?

A. Yes.

Q. Did he respond?

A. Yes, he did.

Q. What did he say?

A. He stated to me that himself and his wife had an understanding of what has happened and that life must go on and that he—that she should care for their child.

Q. As part of this investigation, did you—that you conducted on the 10th of October, during the interview was there an opportunity afforded by you to the defendant to discuss with you any mental or emotional conditions and his general health?

A. Yes.

Q. What if anything did the defendant tell you about his mental condition or emotional conditions at the time?

A. He stated to me that he has never had any previous mental or emotional conditions.

Q. What about his general physical health?

A. He was in good health.

Q. When you asked him about the charge for which he had pled guilty of Linda Goldstone, he didn't speak to you about that, did he?

A. He stated to me, 'No comment.' "

Swies testified that the defendant did not express any remorse or feelings of regret. On cross-examination he acknowledged that he did not have any educational background either in psychiatry or psychology. On redirect examination the witness expressed his opinion that the defendant did not seem remorseful.

We consider that communications between a defendant and a probation officer are not privileged. The situation does not present the same concerns that support the attorney-client or physician-client privilege, viz, that the defendant will not be candid and will not make disclosures to the professional out of fear that the information will later be used against him. As the defendant's brief admits, "a defendant awaiting sentencing has no obligation to speak to a probation officer or to aid in the preparation of a presentence report." (*People ex rel. Kunce v. Hogan* (1976), 37 Ill. App. 3d 673.) For the same reason, the defendant's fifth amendment right to remain silent was not violated. The defendant not only voluntarily chose to talk to the probation officer, but also requested the investigation. Section 9—1(e) of the Criminal Code of 1961 provided constructive notice to the defendant that the presentence report might

be used against him at a death penalty hearing. Ill. Rev. Stat. 1979, ch. 38, par. 9—1(e).

The defendant further contends that Swies' "no comment" response was an improper comment on his silence under *Doyle v. Ohio* (1976), 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240. The defendant suggests that the reference to the defendant's silence was meant to impress upon the jury the notion that the defendant was not remorseful or cooperative. In *Doyle*, it was held that the prosecutor's reference during closing argument to the defendant's silence was improperly used to impeach his testimony at trial. Williams, instead of choosing to remain silent, requested an investigation and discussed his military service history, his physical and mental health, and his understanding with his wife concerning the situation that resulted from his criminal acts. Too, the reference to the defendant's failure to comment was made by a witness, not by a prosecutor during closing argument. The People never referred to the witness' "no comment" response.

Since Swies also stated that the defendant had cooperated throughout the interview and the defendant later took the stand and made a rather complete disclosure of his conduct, it cannot be seriously contended that Swies' "no comment" response influenced the jury to believe that the defendant was uncooperative.

The People did express surprise during closing argument that Williams had not expressed remorse, but its surprise was based on the defendant's testimony during trial, not on Swies' "no comment" reference. The defendant concedes that it is proper during a sentencing hearing to consider the defendant's "lack of a penitent spirit." (*People v. Morgan* (1974), 59 Ill. 2d 276.) If any error occurred by Swies' opinion testimony concerning remorse, it was cured by his testimony on cross-examination when he stated that he was not qualified to express an expert opinion.

During cross-examination, at the request of the defendant's attorney, Swies read aloud a portion of a "victim impact statement" which was prepared during the presentence investigation. The part he read was written by the defendant's counsel and stated that the defendant recognized his responsibility for his conduct, was cooperative, and thought he could help others if he were allowed to live by showing through example the consequences of his conduct. On redirect examination, at the State's request, he read, over the defendant's objection, a section of the "vic-

tim impact statement" which had been written by one of the prosecuting attorneys. The part read narrated that the victim "was a 29-year old mother of a 3-year-old son, the wife of a doctor," and that she was on her way to teach a course in the Lamaze method of childbirth when she was abducted. It also referred to the sorrowful impact of the crime on the victim's immediate family and parents.

We do not consider it was reversible error under the circumstances to have the prosecution's statement read. The defendant was the party which introduced the fact that the attorneys had submitted comments during the presentence investigation, and the defense was the first to have its comment read to the jury. The defense was aware that the prosecution had made a comment and presumably knew that it would attempt to introduce its comment on redirect examination. If there was impropriety in having the lawyers' comments read, it must be kept in mind that the defense opened the door and should not complain that the prosecution also crossed the threshold.

The defendant was not substantially prejudiced. The factual statements had substantially been established prior to Swies' testimony, and the jury was informed that the comment was made by one of the prosecutors.

During the hearing in aggravation and mitigation, the defendant attempted to have a newspaper reporter, three clergymen, and a professor of psychiatry describe what a "typical" execution entailed and give opinion testimony as to the deterrent effect of capital punishment. Only the professor had met the defendant. The State's motion *in limine* to prohibit their testimony was allowed. Without their testimony, the defendant contends, the jury was not able to determine if the death penalty was proportionate to the seriousness of the offense or to consider the defendant's potential for rehabilitation. The court did allow a fourth clergyman, Rev. Thomas Feamster, to take the stand, but objections were sustained on the ground of relevancy as to the questions posed.

In this State a sentence must correspond to the seriousness of the offense and have the objective of restoring the offender to useful citizenship. (Ill. Const. 1970, art. I, sec. 11; Ill. Rev. Stat. 1979, ch. 38, par. 1—2(c).) The testimony of the proposed witnesses would have gone to beliefs in the unwisdom and immorality of the death penalty, the repelling nature of an execution in an electric chair and that the penalty is not a deterrent to crime. Such testimony would

not have been proper. In 1970, the voters of this State in a referendum approved the death penalty. The Supreme Court of the United States and this court have held capital punishment not to be unconstitutional. (*Gregg v. Georgia* (1976), 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909; *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, 536.) Within constitutional limits, the manner of execution is a matter for the legislature. The defendant was given the opportunity to present evidence in mitigation of his offenses, not to offer views on the death penalty statute. Arguments against the death penalty in general and not containing evidence in mitigation are inadmissible. See *Lockett v. Ohio* (1978), 438 U.S. 586, 604 n.12, 57 L. Ed. 2d 973, 990 n.12, 98 S. Ct. 2954, 2965 n.12 (Burger, C.J., joined by Stewart, Powell and Stevens, JJ.); *People v. Waldron* (1965), 33 Ill. 2d 261, 263.

The professor of psychiatry met with the defendant for a total of 16 hours. The record shows that he would have testified that he wished to study the defendant further for insight into the motivations behind criminal conduct. The professor did not state why Williams would prove a better candidate for study than any other criminal. Too, the fact that the defendant's conduct may be of some scientific interest is not a factor in mitigation of his criminal acts, since it does not concern the circumstances of the offense or the character and record of the defendant. (See *People v. Jones* (1982), 94 Ill. 2d 275; *People v. Gaines* (1981), 88 Ill. 2d 342, 382.) Nor would it serve to restore the defendant to useful citizenship. (See Ill. Rev. Stat. 1979, ch. 38, par. 1001—1—2.) It was not an abuse of discretion for the trial court to exclude the professor's testimony.

The defendant's request that the jury be transported to the State penitentiary at Joliet to view the electric chair was also denied. For the same reasons that the proffered witnesses' testimony was rejected, we do not consider the court's denial of the defendant's request to transport the jury an abuse of discretion.

The defendant next complains that the State should not have been allowed to both open and close the final arguments at the sentencing hearing. Prior to closing argument, the defendant moved to establish the order of the final arguments. It was the defendant's contention that since the State did not have to overcome a burden of proof at this stage of the trial, there should be no rebuttal argument. The defendant proposed that the State would first

present its argument in aggravation, which would be followed by the defendant's argument in mitigation. The trial court, however, allowed the State to present argument in rebuttal.

Although the State acknowledges that there is no burden of proof at the aggravation and mitigation hearing, it argues that it was entitled to rebuttal time because it was the complaining party and had gone forward with the evidence. Supreme Court Rule 233 provides:

> "The parties shall proceed at all stages of the trial *** opening and closing statements, the offering of evidence, and the examination of witnesses, in the order in which they appear in the pleadings unless otherwise agreed by all parties or ordered by the court. ***." (73 Ill. 2d R. 233.)

As the initiator of this action, the State would begin the closing arguments unless otherwise agreed or ordered by the court. Too, we note that the trial court, as authorized by Rule 233, exercised its discretion in allowing the State to open and close the final arguments. Under our Rule 412(c) the State has the affirmative duty to disclose to the defendant's counsel any mitigating evidence of which it has knowledge. The State's contention that it has the burden of going forward with the evidence, therefore, would appear to be correct.

The defendant's citation of *Liptak v. Security Benefit Association* (1932), 350 Ill. 614, is not persuasive. In *Liptak*, this court held that a defendant asserting an affirmative special plea and admitting the establishment of the plaintiff's case is entitled to open and close in presenting the evidence and arguments since it has the burden of proof. In contrast here, neither party had to overcome the burden of proof and the plaintiff's case was not admitted by the defendant. Too, this court did not deny the right to a rebuttal argument in *Liptak*. Rather, the court allowed the party entitled to open the arguments to offer rebuttal as well.

The defendant further argues that he was denied what he calls his right of allocution before the jury. The record does not disclose, however, any indication that the defendant requested to address the jury by way of an unsworn statement. Too, Williams did not raise this issue in his post-trial motion to vacate the sentence. Thus, the issue was waived. (*People v. Lucas* (1981), 88 Ill. 2d 245.) We will, however, consider the argument.

Section 5—4—1(a)(5) of the Unified Code of Corrections provides:

> "Except when the death penalty is sought under hearing procedures otherwise specified, after a determination of guilt, a hearing shall be held to impose the sentence. At the hearing the court shall:
>
> • • •
>
> (5) afford the defendant the opportunity to make a statement in his own behalf." (Ill. Rev. Stat. 1979, ch. 38, par. 1005—4—1(a)(5).)

The statute, thus, explicitly excludes death penalty hearings from its effect.

Our decision in *People v. Gaines* (1982), 88 Ill. 2d 342, is dispositive. We said in *Gaines*:

> "What section 5—4—1(a)(5) provides is the right of allocution in its traditional context: the opportunity to make a statement to the court in the course of a sentencing procedure in which the jury plays no role. That opportunity, even though it is not required by the statute, was offered him. What the defendant sought was the opportunity to make an unsworn statement to the sentencing jury for consideration along with testimony given under oath and the arguments of counsel. The legislature may well have considered that such a statement would at the least confuse the jurors, and might also impair their ability to weigh the aggravating and mitigating factors disclosed by the testimony as the statute directs them to do." 88 Ill. 2d 342, 380.

Although the defendant here did not under our law have the right of allocution, he was given the opportunity to address the court before sentence was imposed and he declined. Too, he did testify at length before the jury.

The defendant complains that he was denied a fair hearing because of improper comment by the prosecutor. The defendant moved at one stage for a rule to show cause why one of the prosecutors should not be held in contempt, citing alleged instances of impropriety. The court, after noting that there had been improper conduct by counsel on both sides, denied the motion. The trial court was certainly in a superior position to assess the conduct of counsel, and it cannot be said that it abused discretion in denying the motion for a rule to show cause.

In some of the instances complained of no objections were made or objections were sustained and the jury was instructed to disregard what was said. The defendant says that the "most blatant" instances of misconduct occurred during cross-examination and argument.

He complains that during cross-examination of the defendant's father, Rev. David Williams, a prosecutor commented to the witness that the prosecution had "nothing against him." An objection to the statement was sustained. The prosecutor rephrased the statement, and again an objection was sustained. It was improper for the prosecutor to repeat the statement to Rev. Williams after the objection had been sustained. The trial court did sustain objection to the rephrased comment, however, and when the jury was instructed to disregard it, we consider that any impropriety was cured. Later, the father was asked whether he would attempt to obtain parole for his son if he received life imprisonment. An objection was sustained, and the jury was told to disregard the question. Subsequently, the defendant's mother, Inell Quinn, was asked a similar question on cross-examination. Again an objection was sustained.

The prosecutor's question regarding the possibility of parole has to be considered in the context of all of the testimony arguing against the imposition of the death penalty. The State notes that relatives and friends asked that the death sentence not be imposed, and that their testimony was on the explicit assumption that the defendant would then spend his life in prison. The State argues that the defendant thus invited questions regarding parole possibilities in that the defense was attempting to form an impression on the jury that the only possibilities of sentences were death or natural life without parole. The State points out too that during closing argument one of the defense attorneys told the jury: "Your choice is not death or freedom. Your choice is death or certain life imprisonment without parole." The State concludes that its questioning regarding parole possibilities was not erroneous in light of the defense inquiries and that it was proper for the State to note that there were alternative punishments.

Clarence Johnson, a friend of the defendant, gave negative responses when asked on cross-examination whether he believed that the defendant was capable of escaping from prison or harming a prison guard. No objection was made, but the defendant moved later for a mistrial, which was denied. During closing argument, one of the prosecutors asked the jury whether the defendant could "ever be a fit person to be around the other people in jail and to be around those jail guards?" The defendant's objection to this question was sustained and, at the defendant's re-

quest, the jury was instructed to disregard the remark. We consider that the court's ruling on the objections and its instruction to disregard corrected any error in the argument. (See *People v. Jones* (1982), 94 Ill. 2d 275, 298—99.) This question by the prosecutor in argument and the question to Johnson on cross-examination have to be considered, the State observes, in the context of the defense contention that the defendant, if the death penalty were not imposed, would be of benefit to society through his wholesome influence and his counseling of other inmates. (See *People v. Hairston* (1970), 46 Ill. 2d 348, 375.) The witness Johnson testified that the defendant has brought him to religion and said that if the defendant were given life imprisonment "he could be a model for somebody else. After some therapy, he can change them, because he changed my life around."

We cannot say that the defendant was deprived of a fair trial on these grounds.

After the jury announced its verdict which called for a sentence of death, the jury was polled by the court clerk at the request of the defendant's counsel. The clerk addressed the jury:

> "THE CLERK: Ladies and gentlemen of the jury, I will ask you the following question:
> 'Was this and is this now your verdict?'
> If it was your verdict you will answer:
> 'It was and is now my verdict.'
> If not, you will answer:
> 'It was not and is not my verdict.'
> No. 285, Stanley Margalski.
> JUROR MARGALSKI: Yes, it was and is my verdict.
> THE CLERK: No. 282, Robert Lynch.
> JUROR LYNCH: It was and is my verdict."

Each of the 10 other jurors responded exactly as Lynch had. No objection was made to the jury poll at the time it was taken. The defendant now complains, as he did in his post-trial motion to vacate, of the manner in which the jury was polled. The defendant asserts that the purpose of polling the jury is to allow the jurors the opportunity to change their verdict, and that this purpose was defeated by the form of the question addressed to each juror. The question propounded to the jurors and the responses recommended by the trial judge, the defendant says, prevented the jurors from changing the verdict that had been reached during their deliberations in the jury room.

The contention of the defendant is somewhat ambigu-

ous. "The polling of a jury is intended 'to ascertain whether any juror had been coerced into agreeing upon a verdict—coerced by his associate jurors.' [Citation.] While polling the jury, a trial court must be careful not to hinder a juror's expression of dissent." (*People ex rel. Paul v. Harvey* (1972), 9 Ill. App. 3d 209, 211.) The trial court, on polling, must determine that the jury verdict accurately reflects each juror's vote as reached during deliberations and that the jurors' votes were not the result of force or coercion. Once that has been determined, the purpose of the polling process has been served.

A jury is to reach its verdict during secret deliberations in the jury room. The deliberations are to determine whether a unanimous verdict can be reached. Except during the polling process, a juror should not be allowed to change his or her individual vote outside the jury room after a unanimous verdict has been reached and announced in open court. The polling process cannot be made another arena for deliberation. *People v. Kellogg* (1979), 77 Ill. 2d 524, 529.

The form of the question used here in polling the jury was directly approved in *People v. Kellogg* (1979), 77 Ill. 2d 524, and implicitly approved in *People v. Preston* (1979), 76 Ill. 2d 274. In *Preston*, after a juror responded "Compromise" to the question during polling, the trial court questioned the juror further as to whether the verdict of guilty accurately reflected her decision during deliberation. She answered affirmatively. This court stated, "There is no basis whatever in the record for the defendant's claim that [the juror] was prevented from giving a negative answer." 76 Ill. 2d 274, 286.

The jurors here had the opportunity to disclose any coercion, mistake, or dissention from the verdict announced. *Preston* demonstrates that the jurors were not "locked in" or limited to giving only a yes-or-no answer. The record shows that the affirmative responses given here by the jurors were clear and unqualified. There was no cause for the trial court to conduct further questioning. See *People v. Kellogg* (1979), 77 Ill. 2d 524, 527-28.

Moreover, any objection to the polling of jurors should be made at the time of the polling, not after the jury has separated following its discharge. Here the defendant's objection was made for the first time three months after sentencing in a post-trial motion to vacate his sentence. Although we have chosen to consider the question, any claim

of error was waived by the failure of the defendant to make timely objection. *People v. Kellogg* (1979), 77 Ill. 2d 524, 530-31; see *Chalmers v. City of Chicago* (1982), 88 Ill. 2d 532.

Finally, the defendant complains that the sentences imposed were inconsistent. He contends that we must either vacate the sentences and remand for resentencing or order that all of the sentences be served concurrently with the sentences he is now serving for previous crimes.

At the time of sentencing, the defendant was under sentence of three concurrent 30-year terms for the rape, aggravated kidnaping and armed robbery of Aline Krone. At the conclusion of the sentencing hearing on the crimes against Linda Goldstone, the following colloquy was had:

> "THE COURT: You have previously been found guilty of the same offense, to-wit, rape, which the record will certainly reflect. The record also reflects that in committing the offense of rape it was accompanied by exceptionally brutal heinous behavior, indicative of wanton cruelty. The court will, therefore, on the charge of rape, sentence you to an extended term of 60 years in the Department of Corrections. On the charge of armed robbery, the court will sentence you to a term of 30 years in the Department of Corrections. On the charge of aggravated kidnapping, the court would likewise sentence you to a term of 30 years.
>
> MR. SHABAT: Your Honor, we would ask that those run concurrent with each other.
>
> THE COURT: That will be the order. The sentences will be served concurrently with each other.
>
> MR. SHABAT: And that those be served consecutively with 775—0211 [*sic*] the Krone case].
>
> THE COURT: The court may enter sentences to run consecutively if one of the offenses for which the defendant was convicted was a Class X felony, where severe bodily injury was inflicted.
>
> The record clearly reflects the fact that severe bodily injury was in fact inflicted.
>
> On the charge of rape, the court would order on the charge of rape, that sentence be served consecutively with the sentence previously imposed by Judge Bentivenga, in Case 77—I-5—02—11 [the Krone case].
>
> Judgment will be entered on the findings.
>
> I would also suggest—
>
> MR. SHABAT: Your Honor, excuse me. Are you also sentencing consecutively with regard to the armed robbery and aggravated kidnapping in this case?
>
> THE COURT: No, sir. Just as to the charge of rape, consecutively."

No comment was made at the time by defense counsel.

The defendant argues that the sentences must be vacated or modified since it is impossible for the three sentences imposed here to run concurrently with each other, as the judge indicated, while only one of the three sentences, the sentence for rape, is to run consecutively to the rape sentence imposed in the Krone case.

There appears to be the inconsistency the defendant describes, but the court's sentencing orders are clear and leave no room for conjecture. The relevant portions of the sentencing orders read:

> "ORDERED that the defendant Hernando Williams is hereby sentenced to the Illinois Department of Corrections as follows:
>
> 1/14/80 The Honorable Judge James E. Strunck sentenced the Defendant to a Term 30 yrs - Ill Dept - Corr —Ct 4 of indict [Aggravated Kidnaping] - Judgment Ent - Plea & finding - Court o/c Said Sentence Conc. - Arm Robbery (Ct 6) of Indt - 30 yrs. BOTH COUNTS CONCURRENT"

and

> "ORDERED that the defendant Hernando Williams is hereby sentenced to the Illinois Department of Corrections as follows:
>
> 1/14/80 - The Honorable Judge James E. Strunck Sentenced the Defendant to a Term of 60 yrs - Ill Dept-Corr - Charge of Rape - Count 5 of indict - Judgment ent - Plea & Finding of Court. o/c Said Sentence *Consecutively* with Sentence imposed 8-3-78 (as to 7715-0211) By Judge Bentivenga." (Emphasis in original.)

A judgment in a criminal proceeding must be clear and definite so that its meaning may be found from the language used without resort to judicial construction to ascertain its meaning. (*People v. Walton* (1969), 118 Ill. App. 2d 324.) In a criminal proceeding, the pronouncement of the sentence is the judicial act which comprises the judgment of the court. The entry of the sentencing order is a ministerial act and is merely evidence of the sentence. (*People v. Allen* (1978), 71 Ill. 2d 378, 381.) In determining the sentences that have been imposed, a reviewing court may refer to the sentencing order. (*People v. Toomer* (1958), 14 Ill. 2d 385; *People v. Puschman* (1951), 409 Ill. 264.) Here the sentencing orders make it clear what sentences were imposed.

For the reasons given, the judgment of the circuit court

NO. 83-5785

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May it Please the Court:

Respondent, the People of the State of Illinois, respectfully pray that this Honorable Court deny the Petition for a Writ of Certiorari filed in this matter.

APPENDIX B

53240 - SAD - Chgo.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

September 30, 1983

State Appellate Defender
109 N. Dearborn St., 8th Flr.
Chicago, IL 60602

No. 53240 - People State of Illinois, appellee vs. Hernando Williams, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause. **Simon J., took no part.**

Very truly yours,

Julieann Hornyak

Clerk of the Supreme Court

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

-vs-

83-5785

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Hernando Williams, now being held in the Condemned Unit of the Illinois State Correctional Center, Pontiac, Illinois, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Illinois without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of this Court.

The Petitioner's affidavit in support of this motion is attached.

Respectfully submitted

STEVEN CLARK
Deputy Defender

KENNETH L. JONES
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street
8th Floor
Chicago, Illinois 60602
(312) 793-5472

COUNSEL FOR PETITIONER

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Hernando Williams, being first duly sworn on oath, depose and say that I am the petitioner in the above-entitled cause; that in support of my motion to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to redress; and that I have been granted leave to proceed as an indigent in all proceedings below. I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the matter are true:

1. Are you presently employed: NO.

a. If the answer is yes, state the amount of your salary of wage per month and give the name and addresss of your employer.

b. If the answer is no, state the date of your last employment

and the amount of the salary and wages per month which you received. March - 1978 / $600.00

2. Have you received within the past twelve months any income from a business, profession or other forms of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or saving accounts? No.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding ordinary household furnishings and clothing? No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statements or answer to any questions in this affidavit will subject me to penalities for perjury.

Hernando Williams
HERNANDO WILLIAMS, Petitioner

SUBSCRIBED AND SWORN TO BEFORE ME
this 6 day of October, 1983

David J. Smith
NOTARY PUBLIC

NO. 83-5785

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
Attorney for Respondent.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
Room 500 Richard J. Daley Center,
Chicago, Illinois 60602,
MICHAEL E. SHABAT,*
JOAN S. CHERRY,
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
*Counsel of Record, (312) 443-5496

NO. 83-5785

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
Attorney for Respondent.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
Room 500 Richard J. Daley Center,
Chicago, Illinois 60602,
MICHAEL E. SHABAT,*
JOAN S. CHERRY,
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
*Counsel of Record, (312) 443-5496

QUESTIONS PRESENTED

1. Whether the use of peremptory challenges by the prosecution should be reviewed in a case in which the prosecution's use of its peremptory challenges was clearly justified by any standard.

2. Whether the dismissal of a single prospective juror should be reviewed where the record of the interrogation of that juror is incomplete and the defense gave no legal grounds for objecting to the dismissal.

3. Whether the prosecution may be given discretion as to whether to seek a death sentence, and whether a comparative review of death sentences is required.

4. Whether the sentencing jury was entitled to consider the fact that petitioner killed his victim in order to prevent her from reporting his crime to the police and from testifying against him in court.

5. Whether petitioner's plea of guilty was lawfully accepted when he was informed at least five times that he could be sentenced to death on his plea.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OPINION BELOW

The opinion of the Illinois Supreme Court in this matter is reported as People v. Williams, 97 Ill. 2d 252, 454 N.E.2d 220 (1983). The Illinois Supreme Court denied petitioner's request for a rehearing on September 30, 1983.

JURISDICTION OF THIS COURT

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1257(3). However, as stated below, petitioner has not set forth sufficient reasons for this Court to grant certiorari in this matter.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution upon which petitioner relies are given on pages 2 and 3 of his petition.

STATEMENT OF THE CASE

Petitioner pled guilty to a particularly bizarre kidnapping, rape, armed robbery and murder. It is necessary to give the facts of the case as they are relevant to the issues raised in Sections III, IV, and V of his petition (prosecutorial discretion, proportionality, and definition of an aggravating factor).

On Thurday March 30, 1978 Linda Goldstone was on her way to Northwestern Memorial Hospital in Chicago to teach a class in natural childbirth. But as she parked her car petitioner approached and robbed Mrs. Goldstone of her money at gunpoint. Then petitioner made her partially disrobe and forced her into his own automobile. Petitioner was to hold Mrs. Goldstone captive over the following three days. For most of that period she was bound, gagged and confined in the trunk of petitioner's car.

On the first night that he held Mrs. Goldstone captive, petitioner gave his sister a ride home from work. Mrs. Goldstone was locked in the trunk of petitioner's car at that time. After he dropped off his sister, petitioner drove to the Dunes Motel on the south side of Chicago and rented a room. Then he forced Mrs. Goldstone into the room and raped her.

After the rape at the Dunes Motel petitioner drove to a closed gas station which had a pay telephone. There he ordered Mrs. Goldstone to call home and warn her husband not to call the police. Mrs. Goldstone called home twice, and during the second call spoke to her husband. He heard her say that she was all right and would be home in a little while. In the background he heard petitioner say, "Shut up bitch. Tell him you'll be home in about an hour."

After the second call Mrs. Goldstone broke and ran, trying to escape. Petitioner ran after her and caught her. Mrs. Goldstone then and at other times tried to persuade petitioner to release her, but he refused.

Evidence indicated that while petitioner held Mrs. Goldstone captive he inflicted one or more severe beatings on her. Witnesses who saw her later realized immediately that she had been beaten up. The Cook County Medical Examiner testified that Mrs. Goldstone had abrasions and contusions at numerous points on her body, particularly the face and pelvic regions.

On Friday March 31 (the second day Mrs. Goldstone was held captive) petitioner drove home and changed clothes. Then, with Mrs. Goldstone still in the trunk, he drove to the Maybrook Courthouse just west of Chicago. Peti-

tioner had to make a court appearance there in a case in which he was charged with the rape of a woman called Aline Krone.

Petitioner parked his car in the courthouse parking lot, and talked to Mrs. Goldstone through the lid of the trunk for a while. Then he went into the courtroom and met the law clerk who appeared on behalf of petitioner's attorney. Petitioner's case was continued.

Later, after his arrest in this matter, petitioner was convicted of the rape, aggravated kidnapping and armed robbery of Aline Krone. That conviction was affirmed on appeal.

After his court appearance petitioner drove to the south side of Chicago to visit some friends. But while petitioner was in the apartment of his friends, Linda Golstone called for help through the lid of the trunk to people on the street. A woman passing heard Linda Goldstone say, "Help, please, help me somebody. I am in the trunk of a blue car," and saw Mrs. Goldstone stick a tire iron past the edge of the lid. But petitioner looked out the window of the apartment, saw the people gathered around his car, and went down and drove off. The police had been called, but they arrived about ten minutes too late.

Evidence indicated that Linda Goldstone had made strenuous efforts to get out of the trunk. There were striations inside the trunk, the lock was damaged, and paint was discovered beneath Mrs. Goldstone's fingernails.

On Saturday afternoon, after visiting a bar with some friends, petitioner checked into the Sevile Motel. He remained there about two and a half hours and during that period he raped Linda Goldstone again.

After forcing Linda Goldstone back into the trunk, petitioner gave his niece a ride to his sister's home. Then petitioner spent the night with some friends, visiting two taverns, a hamburger stand, and the home of one of those friends.

By this time it was the morning of Saturday, April 1. Petitioner drove to a residential neighborhood on the far south side of Chicago and let Linda Goldstone out of the trunk. He gave her $1.25 and told her to get on a bus and go straight home. He warned her not to call the police.

Petitioner then drove off. As soon as he was out of sight Linda Goldstone ran to a house and called for help. Chester Bukowiecz, who lived there, told Mrs. Goldstone he would call the police, but he refused to let her in. Mr. Bukowiecz did call the police, but when he returned to look at his porch Linda Goldstone was gone.

Petitioner had driven around the block in order to check on what Linda Goldstone was doing. When he saw her on the porch, he ". . . realized there was no way that she was not going to go to the police." Petitioner went up to the house and said, "Bitch, come down off that porch." He then forced Linda Goldstone at gunpoint to go to an abandoned garage around the corner.

Linda Goldstone pleaded with petitioner not to kill her. But petitioner shot her through the chest. After Mrs. Goldstone fell to the ground petitioner put his pistol to her head and fired a bullet through her brain.

The police, who had been called by Mr. Bukowiecz, arrived about five minutes later, but by then petitioner had escaped. However, petitioner was arrested at his home that afternoon. He was charged with murder, armed robbery, aggravated kidnapping and rape, and eventually pled guilty to those offenses. He was sentenced to death after a hearing before a jury.

I.

EVEN IF THIS COURT WERE INCLINED TO RECONSIDER ITS DECISION IN SWAIN V. ALABAMA, THIS WOULD NOT BE A PROPER CASE IN WHICH TO DO SO, SINCE THE REASONS FOR EACH OF THE PROSECUTION'S PEREMPTORY CHALLENGES ARE JUSTIFIABLE AND ARE READILY APPARENT FROM THE RECORD.

In the Swain decision this Court held that the use of peremptory challenges by the prosecution in an individual case was not subject to review. Swain v. Alabama, 380 U.S. 202 (1965). This Court has consistently refused to reconsider Swain, and in fact has repeated the holding in Swain in may subsequent decisions. Even if this Court were inclined to reconsider Swain, this would not be an appropriate case in which to do so, since the record shows that each of the peremptory challenges used by the prosecution against black prospective jurors was justified by reasons other than race.

Petitioner argues that prosecutors in Cook County use peremptory challenges to discriminate against black prospective jurors both in this case and in other cases. That contention should be rejected for the following reasons:

1. Under Swain and subsequent decisions the use of peremptory challenges in a single case is not subject to review.

2. Review of the use of peremptory challenges in a single case would lead to a vast amount of litigation, but would actually obstruct the choosing of fair and impartial juries.

3. Each of the peremptory challenges used by the prosecution in this case against black prospective jurors was justified by reasons other than race.

4. Petitioner has failed to prove systematic discrimination against black prospective jurors in Illinois, and in fact the evidence he cites proves nothing at all.

A.

SWAIN IS STILL THE LAW.

In Swain this Court held that it would not review the use of peremptory challenges by a state prosecutor in a single case, even if all blacks had been removed from a jury. Swain v. Alabama, supra, 380 U.S. 202 (1965). This Court stated that only systematic discrimination in case after case would lead to federal review. Therefore petitioner is not entitled to have this Court review the use of peremptory challenges in his case.

Since 1965 this Court has repeatedly cited Swain as a binding authority. Regents v. Bakke, 438 U.S. 265, 319 Fn. 53 (1978); Apodaca v. Oregon, 406 U.S. 404, 413 (1972); Carter v. Jury Commission, 396 U.S. 320, 323 fn. 2 (1970). In Apodaca, which involved the application of the Sixth Amendment to state court proceedings, this Court restated the principle of Swain. 406 U.S. at 413. And in a footnote to the Bakke opinion this Court stated that a prosecutor may take ethnic background into account in picking a jury, and it is assumed that in doing so he has a lawful and legitimate purpose. 438 U.S. at 319 fn. 53.

The most significant restatement of the principle of Swain was in Taylor v. Louisiana, 419 U.S. 522 (1975), a leading Sixth Amendment case. In Taylor this Court held that systematic exclusion of women from the panels from which juries are chosen is unconstitutional, but made it clear that this principle did not apply to the selection of any particular jury. This Court said:

> It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. (419 U.S. at 538) (emphasis added).

Similar language may be found in City of Mobile v. Bolden, 446 U.S. 55, 77 fn. 24 (1980).

Thus, this Court has held that under the Sixth Amendment the use of peremptory challenges in an individual case is not subject to review. As petitioner notes, this Court has refused to reexamine this question. McCray v. New York, cert. denied, at 103 S.Ct. 2438 (1983); Davis v. Illinois (No. 83-

5768, January 17, 1984).

The Illinois Supreme Court has followed this Court's rule on peremptory challenges both in this matter and in People v. Payne, ___ Ill. 2d ___, ___ N.E.2d ___ (No. 56907, December 1, 1983).

B.

THIS COURT SHOULD NOT RECONSIDER ITS DECISION IN SWAIN, AS A CHANGE IN THAT RULE WOULD OBSTRUCT RATHER THAN PROMOTE THE CHOOSING OF FAIR AND IMPARTIAL JURIES.

This Court should not reconsider the rule it has followed in Swain and many subsequent decisions. The courts in most states have relied on those holdings in formulating their rules of criminal procedure. Furthermore, any change in Swain would make jury selection in criminal cases much more complicated, but would, if anything, make it more difficult to choose fair and impartial juries.

The holding in Swain is firmly rooted in the realities of trial practice. Nothing is more difficult to explain than why a trial lawyer has exercised a peremptory challenge in an individual case. As this Court noted in Swain, peremptory challenges are frequently exercised because of things which cannot be of record, such as hunches, body language or tone of voice. 380 U.S. at 220-221. Picking a jury is an art, not a science, and often the reasons for exercising a peremptory challenge will not be fully known, even to the attorney who has exercised it. Nothing would be more difficult on which to conduct a hearing than the question of why a trial lawyer has challenged particular jurors in an individual case.

In fact if petitioner's argument on this issue were accepted, the result could greatly increase the complexity of the jury selection process but the juries actually chosen would be less fair and impartial than those selected now. Every time a jury is selected, some groups will have no representation on it. As Justice William O. Douglas once said, ". . . in our pluralistic society, a group of 12 men and women could not possibly represent all of the ethnic, racial and economic groups which compose our diverse culture." Donaldson v. California, 404 U.S. 968, 972 (1971) (Douglas, J., dissenting from denial of certiorari). Therefore, in every jury trial in a criminal case a defendant would be able to demand a hearing on the grounds that some racial, ethnic, sexual, occupational, or residential group had been excluded from the jury. Once the

demand was made, the prosecution would then have to explain their use of peremptory challenges, thus in effect converting them into challenges for cause.

The peremptory challenge has been one of the principal instruments used by both the prosecution and the defense to remove actually biased individuals from juries. Petitioner would greatly limit or abolish the use of peremptory challenges by the prosecution. The result might also be to limit the use of peremptory challenges by defendants, as well. As courts in California and Massachusetts have recognized, once the use of peremptory challenges by the prosecution is limited, fair trial practice would require what similar limitations be imposed on the defense. Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979); People v. Wheeler, 583 P.2d 748 (Cal. 1978). Depriving both the prosecution and the defense of true peremptory challenges is hardly the way to ensure the selection of fair and impartial juries.

A remedy already exists for systematic discrimination against black prospective jurors during jury selection in criminal cases. As the Illinois Supreme Court stated in this matter, if a defendant can prove systematic discrimination in case after case, then that defendant would be entitled to a remedy. Defendants have attempted to prove systematic discrimination and have obtained a remedy in reported cases. State v. Washington, 375 So. 2d 1162 (La. 1979); State v. Brown, 371 So. 2d 751 (La. 1979); United States v. Robinson, 421 F.Supp. 467 (D.C. Conn. 1976), reversed, 549 F.2d 240 (1st Cir. 1977) (where statistical data over a period of time was offered but ultimately held insufficient to prove systematic discrimination).

Petitioner claims that few defendants would have the time or money necessary to attempt to prove systematic discrimination. Since petitioner never even attempted to prove systematic discrimination in the state courts, he should not be heard to claim that proof of systematic discrmination would be difficult. After all there are many reported decisions in which elaborate statistical data was presented on the composition of jury panels. These decisions include Donaldson v. California, 404 U.S. 968 (1971); United States ex rel. Barksdale v. Blackburn, 639 F.2d 1115 (5th Cir. 1981); Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978); and Dixon v. Hopper, 407 F.Supp. 58 (M.D. Ga. 1976). Similar data could be compiled on the racial composition of juries, but this has not been done in the case at bar.

In conclusion, unless there is proof of systematic discrimination the parties in a criminal case should be allowed to use their peremptory challenges as they see fit. Any other rule would limit or abolish the peremptory chal-

lenge, which has been a principle instrument used by both prosecution and defense to assure selection of fair and impartial juries.

C.

THE RECORD PROVES THAT THE USE OF PEREMPTORY CHALLENGES BY THE PROSECUTION IN THIS CASE WAS ENTIRELY JUSTIFIABLE, AND WAS NOT BASED ON RACE.

Even if this Court were inclined to reconsider its decision in Swain, this would be the wrong case in which to do so. It is the position of respondent that the use of peremptory challenges by the prosecution in a single case is not subject to review. But if the eight peremptory challenges used by the prosecution against black prospective jurors in this case were to be reviewed, that review would show that each challenge was justified by reasons other than race. Any trial lawyer would understand why those eight prospective jurors were excused.

Prospective juror Theresa Powell was an administrator for the University of Illinois. (T.R. 835) Prosecutors tend to be suspicious of academic intellectuals, and vice versa. She had a son the same age as petitioner. (T.R. 837) Furthermore, she stated forthrightly that ". . . I am opposed to capital punishment and I feel if I am on that jury, I would certainly argue for his life, yes." (T.R. 884)

Regina McBey was questioned as follows (T.R. 1768):

> Q: . . . can you be a person that could sign your name to a verdict mandating the death of an individual, could you do that?
>
> (Objection overruled)
>
> THE JUROR: A: No.

In addition, Mrs. McBey was an active member of the Baptist Church. (T.R. 1630) The first defense witness was petitioner's father, Rev. David Williams, who in addition to owning a manufacturing company was also an ordained Baptist minister. Most of the defense witnesses were active church members. Even petitioner had once been assistant director of the Young Adults Choir of St. Mary's Missionary Baptist Church. (T.R. 4603-4608) The prosecutors had every reason to believe that an active Baptist would be prejudiced in favor of the defense.

Leonora Simmons was also active in a Baptist church. (T.R. 702) She stated that she was very nervous, had high blood pressure, and did not want to be on the jury. (T.R. 701, 715) She also had doubts about the death penalty (T.R. 705, 709-710):

> A: Well, I just feel the Bible says I should not kill, but by me saying that, that's still not going to stop the death penalty, you know. So, that's how.
>
> Q: So, your position or your feeling or your religious scruples derive from the Bible, is that correct?
>
> A: Right.

Judith Timmons was also a practicing Baptist. (T.R. 1921) In addition, she repeatedly expressed the view that if petitioner had committed the crimes he was charged with then he must be a sick man. (T.R. 1950, 1953, 2010) She said ". . . a person to do something like that had to be sick or crazy. . . ." (T.R. 1953) Thus she had already formed an opinion that one of the statutory mitigating factors existed. Ill. Rev. Stat., Ch. 38, sec. 9-1(c)(2).

Brenda Jackson had lived for nine years close to the location where Linda Goldstone was shot to death. (T.R. 1503) No lawyer wants a person on the jury who has private knowledge about the case. In addition, she expressed doubts about her ability to be fair to both sides. (T.R. 1515)

Fannie Mae Green stated that she was nervous about being called for jury service and did not want to serve on the jury. (T.R. 1517, 1534) A juror who did not want to serve would be likely to be hostile to the prosecution, since most of the hearing would be taken up by presentation of prosecution witnesses. Also, a nervous juror might vote against the death penalty for fear of retaliation. This was particularly true since the prosecution was intending to present evidence that petitioner, while in jail, was active in the Disciples street gang. (T.R. 5121-5123, 5127)

Lillian Wallace had an adolescent son, but no daughters. (T.R. 1932) Therefore the assistant state's attorneys could have felt that she was the wrong person to ask to approve a death sentence for a young man.

Sheryl Williams apparently was a young, unmarried woman. (T.R. 278) The record indicates that petitioner, who had four children by four different mothers, was attractive to such women. (T.R. 4697) More important,

Miss Williams was a bank teller. (T.R. 277) Much of the evidence concerning the rape of Aline Krone would be about the operations of a bank, and in fact a teller was one of the prosecution's witnesses. (T.R. 4264-4270) The prosecution was going to ask the jury to believe that petitioner could have forced Aline Krone at gunpoint to cash a check at a bank and then turn the money over to him. Trial lawyers dislike prospective jurors who would carry special knowledge back to the jury room.

Finally, it should be noted that at one point the prosecutors argued vehemently that a black prospective juror should be seated, while the defense argued just as strenuously that he should be excused. (T.R. 1590-1599) That juror was Charles Lee who, although he was a security guard at Northwestern Memorial Hospital, had not been on duty when Linda Goldstone was kidnapped. Although Lee was eventually excused for cause, the record of his interrogation shows that the prosecution did not want an all-white jury.

Thus there was good reason for each of the eight peremptory challenges used by the prosecution to excuse black jurors. The prosecution had no obligation to explain their use of peremptory challenges, but they could have done so.

D.

PETITIONER FAILED TO ALLEGE SYSTEMATIC DISCRIMINATION IN THE STATE COURTS AND HAS FAILED TO PROVE IT IN THIS COURT.

Petitioner alleges that prosecutors in Illinois systematically discriminate against black prospective jurors. But at no time in the trial court or in the Illinois Supreme Court did petitioner offer evidence of systematic discrimination. This failure to offer evidence waives the issue. Nor has petitioner offered any valid evidence of systematic discrimination to this Court. He has merely quoted subjective opinions from dissents or from decisions which have been overruled.

In the state trial court petitioner was represented by the Cook County Public Defender's Office. That office has a representative in every criminal courtroom in Cook County, so petitioner could easily have gathered data on how peremptory challenges are actually used by prosecutors in the Chicago area. Whatever may be the case with a typical criminal defendant, petitioner could easily have offered evidence of systematic discrimination if any such evidence had existed. But no evidence on how juries are selected in Cook County was ever presented to the trial court.

On appeal petitioner is represented by the Illinois State Appellate Defender with the assistance of the Illinois Coalition Against the Death Penalty. Both organizations have the resources to accumulate data on the use of peremptory challenges in Illinois, so it may be assumed that the citations in their petition are the strongest evidence of discrimination that could be offered. Nevertheless, the unsupported assertions in the petition for certiorari do not prove anything.

Under Illinois law the failure to raise an issue in the trial court waives it on appeal. People v. Pickett, 54 Ill. 2d 280, 296 N.E.2d 856 (1973). In addition, the failure to raise an issue in state court waives it on review in this Court. Michigan v. Tyler, 436 U.S. 499, 512 fn. 7 (1978); Henry v. Mississippi, 379 U.S. 443, 446 (1965). Because evidence of systematic discrimination was not offered to the Illinois courts, petitioner has no legal right to seek certiorari on that issue.

Nor has petitioner offered any valid evidence of systematic discrimination to this Court. First of all, petitioner relies on the subjective impressions expressed by Illinois Supreme Court Justice Seymour Simon in his dissent in People v. Gosberry, 449 N.E.2d 815 (1983). But Justice Simon's six colleagues obviously do not share his opinions, because in Gosberry they summarily reversed over his dissent. Since Justice Simon did not cite any facts to back his assertions in Gosberry, his minority conclusion is no proof of systematic discrimination.

Petitioner also cites a subjective conclusion from the Gillard decision to the effect that prosecutors in Chicago discriminate in the use of peremptory challenges. People v. Gillard, 112 Ill. App. 3d 799, 807, 445 N.E.2d 1293, 1299 (1st Dist. 1983). Petitioner fails to note, however, that the only authority cited for that proposition in the Gillard opinion was the statement of a columnist in the Chicago Sun Times. The opinion of a newspaper columnist is not proof of anything. In any event the decision of the Appellate Court in Gillard was summarily reversed on appeal, so it is hardly a compelling authority. People v. Gillard (Ill. Sup. Ct., No. 58145, October 4, 1983).

The conclusions of Cook County Circuit Court Judge Howard Miller were also subjective impressions without any data cited in support. Petitioner's reliance on opinions without any factual basis emphasizes his failure to prove systematic discriminations.

Finally, petitioner asserts that in 40 out of 61 juries in death penalty cases in Illinois there were no jurors from racial minorities. But that assertion

would have meaning only if it were accompanied by information concerning the number of minority prospective jurors in those cases and the number of minority jurors excused through peremptory challenges exercised by the prosecution. After all, some of those juries were chosen in downstate Illinois counties with virtually no black resicents. Furthermore, petitioner never presented such evidence in the trial court or in his brief in the Illinois Supreme Court. Therefore, the prosecution and the Illinois courts have never been given a chance to test the accuracy of petitioner's assertions.

In conclusion, petitioner never attempted to prove systematic discrimination in the Illinois courts, although he had the ability to compile statistics on the use of peremptory challenges by the prosecution in Cook County. In this Court he relies on assertions and conclusions without factual support in his attempt to establish systematic discrimination. Since petitioner has failed to establish systematic discrimination in case after case, he has failed to meet the legal standard required for an attack on the prosecution's use of peremptory challenges. In any event, the record in this case shows that there were reasons other than race for each of the prosecution's challenges to black prospective jurors. Therefore the petition for a writ of certiorari ought to be denied.

II.

PETITIONER HAS WAIVED THE ISSUE OF WHETHER PROSPECTIVE JUROR DOLORES HUDSON WAS PROPERLY EXCUSED, BECAUSE HE FAILED TO PROVIDE A COMPLETE RECORD OF HER INTERROGATION AND BECAUSE HE FAILED TO OBJECT ON WITHERSPOON GROUNDS TO THE ORDER EXCUSING HER.

Jury selection in this case lasted five weeks and about 130 prospective jurors were examined. Petitioner's argument, however, concerns only one of those prospective jurors. He contends that Dolores Hudson should not have been excused. But for the following reasons petitioner has no basis to challenge the order excusing Mrs. Hudson:

1. Petitioner has failed to preserve a complete record of her interrogation.

2. Petitioner failed to object to excusing her on any grounds other than that he had failed to complete his interrogation of her, so Witherspoon grounds were waived.

3. Even the partial record of the interrogation of Mrs. Hudson shows that she would refuse to sign a death sentence on religious grounds.

4. Even assuming that it was error to excuse Mrs. Hudson, it would be harmless beyond a reasonable doubt, since the prosecution still had three peremptory challenges left at the end of jury selection.

Excusing Dolores Hudson for cause could not have affected the outcome of the sentencing hearing, since the prosecution could have excused her anyway through use of a peremptory challenge. Under Illinois law the granting of a challenge for cause is considered harmless when the prosecution does not exhaust its peremptories. People v. Moore, 42 Ill. 2d 73, 246 N.E.2d 299 (1969), aff'd sub nom. Moore v. Illinois, 408 U.S. 786 (1972); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968). This is a reasonable rule of law, consistent with the holding of this Court that even constitutional errors may be found to be harmless beyond a reasonable doubt. United States v. Hastings, 103 S.Ct. 1974 (1983). Petitioner relies on the Davis decision for the propos-

ition that seating a single juror in violation of Witherspoon is error, but the majority opinion in Davis failed to consider whether this error could be harmless when the prosecution had peremptory challenges remaining. Davis v. Georgia, 429 U.S. 122 (1976); Witherspoon v. Illinois, 391 U.S. 510 (1968). The record does not show that any error occurred when Mrs. Hudson was excused, but excusing her for cause was harmless beyond a reasonable doubt when the prosecution could have used any of its three remaining peremptories to remove her.

But in any event petitioner is barred from attacking the challenge for cause to Mrs. Hudson, since he has failed to provide a complete record of her interrogation. The record on appeal gives the interrogation of Mrs. Hudson by defense counsel, but the interrogation by the prosecution is completely missing. The record on appeal does establish, however, that there was interrogation of Mrs. Hudson when it is not reported in the transcript. The jury was selected in panels of four, as then required by statute. Ill. Rev. Stat. 1977, Ch. 38, sec. 115-4(f). Since a panel of four had been tendered to the defense, one of petitioner's attorneys was the first to question Mrs. Hudson. During that interrogation the prosecution made a challenge for cause on Witherspoon grounds, which was denied by the trial court. (T.R. 2406-2407) Shortly thereafter the defense attorney announced that he had no further questions of Mrs. Hudson. (T.R. 2410) The trial judge then told Mrs. Hudson to step down. Since the jurors were being interrogated individually in camera, this simply meant that Mrs. Hudson should step outside until the defense tendered a panel of four to the prosecution, and it was the prosecution's turn to interrogate her.

There was a recess, and then the very next thing reported concerning Mrs. Hudson is the trial court's announcement for the record that she had been excused for cause. Defense counsel objected solely on the grounds that he had not finished his interrogation of Mrs. Hudson. Clearly she had been interrogated in unreported proceedings by the prosecution, and that interrogation had caused both the trial court and the defense attorneys to change their position. The trial court, which had previously denied a challenge for cause, now granted one. Defense counsel, who had previously announced that he had no more questions of Mrs. Hudson, now objected on the grounds that he had not been allowed to interrogate her enough.

In Illinois it is the duty of an appellant to provide a complete record of jury selection, and error will not be assumed from a silent record. People v. Gaines, 88 Ill. 2d 342, 354, 430 N.E.2d 1046, 1054 (1981). This Court also

requires that an appellant assure that all alleged errors are reflected in the record on appeal. Ciucci v. Illinois, 356 U.S. 571 (1958). As a practical matter, this Court could not adequately review the proceedings concerning prospective juror Dolores Hudson without a complete record. Therefore the incomplete record is sufficient grounds to refuse a grant of certiorari on this issue.

In addition, as the Illinois Supreme Court noted, petitioner's attorney at trial never objected to excusing Mrs. Hudson on the grounds that the challenge for cause was improper under Witherspoon. The sole grounds given by defense counsel for his objection was that he had not been given an opportunity to question her enough. Under Illinois law it is the duty of a defense attorney in a criminal case to ". . . explicitly make known to the court the nature of his objection, and move the court for the particular relief desired." People v. Adams, 4 Ill. 2d 453, 458, 123 N.E.2d 327, 330 (1954). By objecting to the challenge for cause on specific grounds, and by failing to make a Witherspoon objection, petitioner waived this issue with respect to Mrs. Hudson.

"Failure to present a federal question in conformance with state procedure constitutes an adequate and independent grounds of decision barring review by this Court, so long as the State has a legitimate interest in enforcing its procedural rule." Michigan v. Tyler, 436 U.S. 499, 512 fn. 7 (1978). See also Engle v. Issac, 456 U.S. 107 (1982). Since petitioner failed to raise his constitutional issue in a manner consistent with a reasonable state procedural rule, he is barred from raising it in this Court.

Petitioner cites numerous cases in an attempt to establish that Witherspoon objections during jury selection may never be waived. Those cases do not establish such a rule. But in any event they may all be distinguished on the grounds that here the failure to object on a Witherspoon basis was not a mistake by defense counsel, but was a matter of trial strategy. The record of jury selection in this case demonstrates that the defense attorneys knew very well how to make a Witherspoon objection when they wanted to. Clearly the defense attorney did not know whether he wanted Dolores Hudson to be a juror in this case or not. Therefore, instead of objecting to excusing her on substantive grounds, he merely argued that he should be given a chance to ask her further questions. Since defense counsel was employing a reasonable strategy when he merely requested an opportunity to question Mrs. Hudson further, petitioner should be held to the results.

Finally, the record in this case indicates that Dolores Hudson was

properly excused under the rule of Witherspoon v. Illinois, 391 U.S. 510 (1968). The record of jury selection, incomplete as it is, nevertheless was sufficient to justify a conclusion by the trial judge that Mrs. Hudson could not follow the court's instructions and could not sign a death penalty verdict even when justified by the law and the evidence. The record reflects the following exchange (T.R. 2405):

> THE COURT: You don't like the electric chair? Miss Hudson, do you feel that in certain cases -- or can you conceive of the situation where the death penalty would be an appropriate punishment?
>
> MRS. HUDSON: I-I-I was always taught thou shall not kill, and I would feel, you know, I would sit there and -- no matter what this person done, you know, to me, and I will sit there and write down that the death penalty, and I don't believe in it, you know, killing anybody, and that would be a burden on me, that my vote was in there to do this action, and I don't believe in it, you know.

Mrs. Hudson's opinions were not expressed according to a precise legal formula. The opinions of lay people seldom are. But they were sufficient to justify a conclusion by the trial judge that Mrs. Hudson for religious reasons could not sign a death penalty verdict. A trial judge must be granted discretion in interpreting the unorganized and emotional statements of a lay person.

Later, when Mrs. Hudson tried to explain her response, she was immediately cut off by the defense attorney (T.R. 2407):

> MRS. HUDSON: Well, just like I told you, I don't believe in the death chair, so --
>
> DEFENSE COUNSEL: I have no further questions, Judge.

If Mrs. Hudson's responses were ambiguous, then it was because petitioner refused to let her explain her answers. But the trial judge, who saw and heard Mrs. Hudson, could well conclude that she could never sign a death penalty verdict in any circumstances.

In conclusion, petitioner was not prejudiced when Dolores Hudson was excused for cause, since the prosecution could have used one of its remaining peremptory challenges to excuse her. Petitioner has failed to include the

prosecution's interrogation of Mrs. Hudson in the record on appeal, so he is barred from asserting that she was improperly excused. Petitioner never objected on Witherspoon grounds to excusing Mrs. Hudson, so he has waived the issue under a valid Illinois procedural rule. And finally, even the incomplete record was sufficient to justify a conclusion by the trial judge that Mrs. Hudson would not vote to impose a death sentence under any circumstances.*

---

* Petitioner asserts in a footnote that prospective jurors Jean Samp and Joan Carter were improperly excused for cause. But Mrs. Samp stated that she could not be an unbiased juror, and Mrs. Carter said that she would follow her inner feelings rather than the law. A bias on the part of a juror and a refusal to follow that law are appropriate grounds for a challenge for cause, quite apart from Witherspoon. Adams v. Texas, 448 U.S. 38, 44 (1980); Lockett v. Ohio, 438 U.S. 586, 596 (1978).

III.

THE ILLINOIS DEATH PENALTY STATUTE IS CONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AS INTERPRETED BY THIS COURT.

A.

PROSECUTORIAL DISCRETION ON WHETHER TO SEEK A DEATH SENTENCE IS BOTH DESIRABLE AND UNAVOIDABLE.

In every American jurisdiction which has the death penalty certain executive officials must choose whether a death sentence may be imposed or carried out. A prosecutor may always block imposition of a death sentence by bringing a lesser charge or no charge at all. Even after a death sentence has been imposed, a governor (or the President of the United States in federal cases) may prevent it from being carried out by extending executive clemency. These grants of discretion are both desirable and unavoidable.

Such discretion is unavoidable because in our legal system the initiative in prosecuting a case always lies with the executive branch of government. A prosecutor may always block imposition of a death sentence by simply refusing to charge a death penalty offense. It is true that a death penalty statute might be devised under which a death penalty hearing followed automatically after a murder conviction. But even then a prosecutor could prevent imposition of a death sentence by simply refusing to present evidence of aggravating factors. Thus the Illinois death penalty statute, which gives prosecutors discretion on whether to seek a death sentence, simply recognizes a result that would be inevitable under any death penalty statute which could be drafted.

A grant of prosecutorial discretion is desirable because a death penalty statute would be intolerable if the executive branch of government was required to seek death sentences against its will and had no opportunity to exercise mercy. As this Court said in Gregg v. Georgia, 428 U.S. 153, 199 (1976):

> First, petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons who he wishes to prosecute for a capital offense and to plea bargain with them.... Nothing in any of our

> cases suggests that the decision to afford an individual defendant mercy violates the Constitution.

In a footnote in Gregg this Court suggested that outlawing prosecutorial discretion might be unconstitutional for the same reason that mandatory death sentences are unconstitutional. 428 U.S. at 199.

It must be emphasized that petitioner makes no claim that prosecutorial discretion was exercised in an arbitrary or discriminatory fashion in his particular case. Instead, he attacks the concept of prosecutorial discretion in general. Indeed the facts of this case suggest that prosecutors would have requested a death sentence for petitioner in Sangamon County or any other county in Illinois.

This Court has held that under the Constitution prosecutors have discretion to decide what charges will be brought against a defendant, even when the possible charges involve very different punishments. United States v. Goodwin, 457 U.S. 368 (1982); Bordenkircher v. Hayes, 434 U.S. 357 (1978). The exercise of prosecutorial discretion is perhaps even more necessary in potential death penalty cases than in other cases.

Petitioner also suggests that the Constitution requires that the death penalty must be sought on a uniform basis throughout Illinois, and that local prosecutors may make no allowances for local conditions. But it would be clearly unreasonable, in a state as diverse as Illinois, to require every community to deal with crime in the same manner. Illinois, after all, contains the City of Chicago, which has 600 to 1,000 murders a year, and also contains rural counties in which the time between murders may be measured in years or decades. The reason why the death penalty exists is to protect the public and to express the outrage of society at particularly horrible crimes. Gregg v. Georgia, supra, 428 U.S. 153 (1976). If the elected representative of a local community feels that a death sentence is unnecessary to accomplish those goals, then he should not be forced to request one. In the Pulley decision this Court held that the Constitution does not require statewide review of death sentences for proportionality. Pulley v. Harris (No. 82-1095, January 23, 1984). That decision implies that statewide uniformity in enforcement of a death penalty statute is not constitutionally required.

In conclusion, prosecutorial discretion in seeking death sentences is unavoidable under any death penalty statute that could be drafted. This Court has clearly held prosecutorial discretion to be a valid and constitutional part of this country's system of justice.

B.

THE ILLINOIS DEATH PENALTY STATUTE COMPLIES WITH THIS COURT'S DECISIONS IN PROVIDING THAT, ONCE A DEFENDANT HAS BEEN PROVEN ELIGIBLE FOR THE DEATH PENALTY BEYOND A REASONABLE DOUBT, ALL AGGRAVATING AND MITIGATING FACTORS MAY BE CONSIDERED IN DETERMINING WHETHER A DEATH SENTENCE WILL ACTUALLY BE IMPOSED.

The Illinois death penalty statute provides that a judge or jury shall deliberate on a death sentence in two stages. First, the prosecution must establish eligibility by proving beyond a reasonable doubt that one of a limited and specific list of aggravating factors exists. Then, if the defendant has been proven eligible beyond a reasonable doubt, the judge or jury may consider all aggravating and mitigating factors in determining whether a death sentence will actually be imposed. Ill. Rev. Stat. 1977, Ch. 38, sec. 9-1.

This statutory plan is clearly constitutional according to the decisions of this Court. The requirement that eligibility be proven beyond a reasonable doubt under a limited list of aggravating factors is designed to assure that the jury's discretion is controlled by specific standards. Gregg v. Georgia, 428 U.S. 153 (1976). The requirement that all aggravating and mitigating factors may be considered once eligibility is proven is designed to assure that the individual characteristics of each defendant are examined. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner contends that the Illinois statute is unconstitutional in that it allows evidence of all aggravating and mitigating factors at the second stage of the proceedings and in that it fails to set a burden of proof at the second stage. Those contentions have been rejected by this Court.

The Illinois statute is similar to the Florida statute upheld by this Court in Proffitt v. Florida, 428 U.S. 242 (1976). Both the Florida and the Illinois statutes were in turn based on the Model Penal Code. Neither statutes provides for a burden of proof when aggravating factors are weighed against mitigating factors by a judge or jury. In Proffitt this Court held that the Florida statute was sufficient to prevent arbitrary imposition of the death penalty.

The Illinois statute requires a specific finding that the existence of at least one statutory aggravating factor be proven beyond a reasonable doubt. But after the jury's discretion is thus limited, all relevant aggravating and

mitigating evidence may be considered. It is entirely appropriate that no death sentence may be imposed until after the jury has heard all relevant evidence. As this Court said in California v. Ramos, 103 S.Ct. 3446, 3456 (1983):

> Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense the jury's choice between life and death must be individualized.

In fact this Court has struck down statutes which did not permit individual consideration of the characteristics of each defendant in a capital punishment case. Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner argues that some standard or burden of proof must be employed to direct the jury's consideration of aggravation and mitigation. This argument was rejected by this Court in Zant v. Stephens, 103 S.Ct. 2733 (1983). Petitioner attempts to distinguish Zant on the grounds that the Georgia statute provided for pretrial discovery of evidence to be used at a death penalty hearing. But petitioner has no standing to make that argument, since he also was given full discovery. The only significant aggravating evidence used by the prosecution concerned the murder of Linda Goldstone and the rape of Eileen Krone. Petitioner was given all relevant documents concerning both offenses.

In fact a burden of proof at the second stage of an Illinois death penalty hearing would make little or no sense. The function of the jury, when it weighs aggravating and mitigating evidence, is not to make a particular factual finding, but to weigh the importance of a large number of different facts. Just as there is no burden of proof at an ordinary sentencing hearing before a judge, there should be no burden of proof when a jury weighs the comparative importance of aggravating and mitigating factors. Every time a sentencing hearing occurs in an ordinary criminal case, facts are evaluated without a burden of proof on either party.

Petitioner argues that under the Illinois statute the jury might consider impermissible or irrelevant aggravating factors. But a judge has the power to control the evidence and argument heard by the jury, and will of course instruct the jury to confine its deliberations to the evidence introduced before it. By controlling evidence and argument the judge can assure that no

improper evidence is introduced or considered.

In any event, petitioner makes no claim that the prosecution in his case relied on any improper aggravating factors. The prosecution here relied on petitioner's crimes and his lack of remorse for those crimes.

In conclusion, the Illinois death penalty statute requires proof of a statutory aggravating factor beyond a reasonable doubt, but then permits consideration of all relevant aggravating and mitigating evidence. This is a reasonable and constitutional means of channeling the jury's discretion while permitting individual consideration of the character and history of each defendant.

C.

PETITIONER'S ARGUMENT CONCERNING PROPORTIONALITY WAS REJECTED BY THIS COURT IN PULLEY V. HARRIS.

Petitioner argues that the Illinois death penalty statute is unconstitutional in that it fails to provide for appellate review of death sentences for proportionality. Respondent asserts that the Illinois statute does permit such a review. But in any event petitioner's contention was rejected by this Court in Pulley v. Harris (No. 82-1095, January 23, 1984).

In addition, petitioner could not benefit from a proportionality review as his crimes are unique. So far as respondent is aware, there has never been another case in which murderer and rapist held his victim captive while making a court appearance on another rape case.

IV.

SINCE THE EVIDENCE SHOWED THAT PETITIONER KILLED LINDA GOLDSTONE WHILE THE POLICE WERE ON THEIR WAY TO THE SCENE, AND THAT SHE WAS KILLED SPECIFICALLY IN ORDER TO KEEP HER FROM TALKING TO THE POLICE, IT WAS PROVEN THAT PETITIONER KILLED A WITNESS ACCORDING TO A LIMITED DEFINITION OF THAT AGGRAVATING FACTOR.

Petitioner was found eligible for the death penalty under two of the aggravating factors listed in the Illinois statute. The first was that petitioner had killed Linda in the course of a rape, armed robbery and aggravated kidnapping, and the second was that petitioner killed Linda Goldstone because she was a witness against him. Ill. Rev. Stat. 1977, Ch. 38, secs. 9-1(b)(6), 9-1(b)(7). Under the Illinois statute either aggravating factor made petitioner eligible for the death penalty, although the jury could still refuse to impose a death sentence if there were sufficient mitigating factors. Petitioner pled guilty to murder, rape, armed robbery and aggravated kidnapping, so of course there is no doubt that he was eligible for the death penalty. But petitioner contends that the second aggravating factor (killing a witness) was so broadly defined that it would make any murder a potential capital offense.

Petitioner's contention is incorrect, and is shown to be incorrect simply by an examination of the facts of this case. The evidence shows that petitioner killed Linda Goldstone in order to obstruct an ongoing police investigation, since the police had been notified and were on their way to the scene when Mrs. Goldstone was murdered. And there is evidence from petitioner's own mouth that he killed Linda Goldstone specifically in order to keep her from talking to the police. Therefore petitioner killed a witness against him within the limited definition used in the Illinois statute. Ill. Rev. Stat. 1977, Ch. 38, sec. 9-1(b)(7). Petitioner's crimes were unique, and the aggravating factor of killing a witness, as defined by the Illinois Supreme Court, would exist in only a small number of murders.

The police were notified soon after Linda Goldstone was kidnapped, and they were searching for her throughout the three days she was held captive. At one point (when Mrs. Goldstone called for help from the trunk of the car to the people on the street) the police came within ten minutes of rescuing her. Therefore at the time Linda Goldston was murdered there was an ongoing police investigation into her kidnapping which was several days old.

On the morning of Saturday, April 1, petitoner released Linda Goldstone after warning her not to go to the police. But after petitioner drove off Mrs. Goldstone ran to the home of Chester Bukowiecz and called for help. Bukowiecz refused to let her in, but he went and called the police. He was actually on the telephone to the police when petitioner kidnapped Linda Goldstone again. The police dispatched a car which was on its way to the scene when Mrs. Goldstone was murdered.

Petitioner confessed at least twice that he kidnapped Linda Goldstone the second time in order to keep her from talking to the police. An investigator reported part of petitioner's oral statement as follows (T.R. 3674):

> He said all right, that he would talk, that he didn't want to hurt Mrs. Goldstone, that he intended to leave her go, and that he in fact let her go on her promise that she would not go to the police. When he saw her go up to the door at 104th and Maryland, he realized there was no way that she wasn't going to go to the police.

Petitioner's later statement to a court reporter said much the same thing (T.R. 3761):

> I saw her on somebody's porch and she was talking to somebody, you know, call the police, you know, this and that, whoever she was talking to.

There was also much other evidence that petitioner had repeatedly warned Linda Goldstone and her husband not to contact the police. Thus there was plenty of evidence to justify the jury's conclusion that Linda Goldstone was killed specifically to prevent her from talking to the police and becoming a witness against petitioner.

Petitioner's crimes were unusual, to say the least. Probably this Court will never see another case in which the victim of an armed robbery, aggravated kidnapping, and rape manages to contact the police before being murdered. The evidence simply does not support petitioner's contention that if he killed a witness, then every murderer kills a witness.

Here two facts were present which are not present in the vast majority of murders. First, there was an ongoing police investigation into petitioner's crimes against his victim at the time he murdered her. Second, there was overwhelming evidence that petitioner killed his victim specifically in order

to prevent her from reporting his crimes to the police. Clearly Illinois has a strong interest in preventing and punishing the killing of a witness. The Illinois Supreme Cout has already held that an ordinary murder case does not involve the killing of a witness within the meaning of the death penalty statute. People v. Brownell, 79 Ill. 2d 508, 404 N.E.2d 181 (1980). It is only the special and unique facts of this case which made petitioner eligible for a death sentence for killing a witness.

In any event, the finding that petitioner was eligible for the death penalty for killing a witness could not have affected the outcome of the death penalty hearing. Petitioner was found to be eligible for the death penalty on the completely separate grounds that he had killed Linda Goldstone in the course of an aggravated kidnapping, armed robbery and rape. Indeed, given petitioner's plea of guilty in those crimes, there was never any doubt that he was eligible for the death penalty. A finding of an improper aggravating factors does not require that a death sentence be vacated, when it is clear that the defendant was eligible for a death sentence on other grounds and the improper finding could not have affected the result. Barclay v. Florida, 103 S.Ct. 3418 (1983).

In this case there were two hearings, although both involved the same jury. At the first hearing the jury found that petitioner was eligible for the death penalty. Then, at a second hearing, the jury found that there were no mitigating factors sufficient to preclude a death sentence, and so sentenced petitioner to death. Since the question of eligibility was carefully separated from the question of mitigation, the finding that petitioner killed a witness against him could not have affected the outcome of the second hearing. After all, at the second hearing the jury was entitled to consider the evidence that petitioner killed Linda Goldstone to keep her from talking to the police, whether that was a proper statutory aggravating factor or not. Since there was no doubt that petitioner was eligible for a death sentence, and since the mitigation hearing was separated from the eligibility hearing, the finding that petitioner killed a witness could not have affected the outcome of this case.

In conclusion, in this case the evidence established that petitioner killed Linda Goldstone in order to obstruct an ongoing police investigation and specifically in order to prevent his victim from reporting his crimes to the police. These factors, which are present in only a small number of murders, are a proper basis on which to impose the death penalty. In any event, the finding that petitioner killed a witness did not cause the imposition of the death

sentence, since petitioner was eligible for the death penalty on completely different grounds.

V.

PETITIONER WAS FULLY AWARE THAT HE COULD BE SENTENCED TO DEATH ON HIS PLEA OF GUILTY.

Petitioner contends that he was not definitely informed before he pled guilty that the prosecution would seek a death sentence. For the following reasons this assertion is misleading and provides no basis for attacking the validity of the plea:

1. The issue is waived, because when petitioner pled guilty he did not demand that the prosecution tell him whether they would seek the death penalty.

2. Petitioner was repeatedly informed, both orally and in writing, that he could be sentenced to death on a plea of guilty.

3. Due process requires only that a defendant pleading guilty be informed of the maximum and minimum sentences he may receive on his plea, and there is no requirement that he be informed of the specific sentence that the prosecution may seek.

4. Any error was harmless, since the record establishes that petitioner knew that the prosecution would seek a death sentence after his plea.

First of all, this issue is waived because petitioner did not demand that the prosecution tell him whether they would seek a death sentence on a plea of guilty. Indeed, petitioner did not even give the prosecution a chance to make up their minds on that point. Petitioner did not give the prosecution any notice that he was going to change his plea. At the hearing at which petitioner announced his change of plea, the assistant state's attorneys expressed surprise and shock, and emphatically stated that no promises or representations had been made to petitioner. (T.R. 1-10) Petitioner did not request that any promises or representations be made. Nor did petitioner give the assistant state's attorneys time to consult with their supervisors, who alone had authority to approve a request for a death sentence. (T.R. 63) By failing to raise this

issue at the time he changed his plea, petitioner waived it for purposes of review. Moore v. Illinois, 408 U.S. 786, 799 (1972).

In any event the record shows that petitioner was repeatedly informed that he could be sentenced to death, and that he was aware of that fact. On the night of his arrest petitioner asked if he was going to be sentenced to death. (T.R. 3686) During pretrial discovery the prosecution tendered to the defense a document which stated the following (T.R. 6116):

> From the outset, this case has been treated as a potential death penalty case by the Prosecution, by the Defense and by the Court. The People, in response to Discovery Motions filed by the Defense, have fully informed the Defendant of the nature of the case against him and will continue to do so.
>
> Clearly the Defendant has been put on notice that this case fits the death penalty statute. Clearly this case fits Ch. 38, sec. 9-1(b)(6) and (7) I.R.S. (1977).

At the time petitioner pleaded guilty, the trial judge admonished him twice that he could be sentenced to death. One of those admonishments was: "If you are found guilty of murder, under the circumstances of which case the death penalty could be imposed." (T.R. 10) In addition, at two points during the change of plea an assistant state's attorney noted that petitioner was eligible for the death penalty. (T.R. 11-12, 63)

Thus petitioner was repeatedly informed that the maximum sentence that could be imposed on him was death. This was all that due process required. Petitioner does not cite any case which requires that the prosecution inform a defendant, before a plea of guilty is accepted, of the specific sentence that the prosecution will request.

Petitioner relies solely on Boykin v. Alabama, 395 U.S. 238 (1969). But that decision did not even require admonishments concerning maximum and minimum sentences. It only required that the record of a guilty plea show that it was voluntary, and that such federal constitutional rights such as the right to a jury trial were knowingly waived. Nothing in Boykin requires that the state notify a defendant before a plea of the specific sentence it will seek.

Shortly after Boykin this Court decided Brady v. United States, 397 U.S. 742 (1970), which is in point against petitioner on this issue. The defendant in Brady had pled guilty to avoid a death sentence, but the statute

which permitted a death sentence was later held unconstitutional. This Court held that even though the defendant had pled guilty under the mistaken impression that he could be sentenced to death after a trial, the plea was still valid and binding. By the same logic petitioner's plea was valid when he knew that it was very likely, but not certain, that the prosecution would seek a death sentence.

In fact it would impose an intolerable burden on trial courts if the prosecution had to announce before a plea the specific sentence it would seek after a plea. Many different sentences may be imposed only if the prosecution introduces certain evidence at the sentencing hearing. The sentence that the prosecution will seek will often depend on an investigation of the defendant's background. It would be irrational to require the prosecution to commit itself to seek a specific sentence before a plea and an investigation. In death penalty cases the only result would be that the prosecution would announce in almost every case that it would seek a death sentence.

Finally, the record in this case shows that in fact petitioner was aware that the prosecution would seek a death sentence after his plea. Petitioner's attorneys during the change of plea made it clear that their stipulation to the evidence would not apply at the death penalty hearing. (T.R. 61) Even more important is the fact that at the conclusion of the change of plea hearing petitioner's attorneys filed a discovery motion seeking disclosure of the grounds on which the prosecution would seek a death sentence. (T.R. 64, 6216) Petitioner's attorneys would not have prepared such a motion in advance unless they knew that the prosecution would ask for the death penalty. Since petitioner knew that the death penalty would be requested, the failure to specifically notify him of that fact was harmless. United States v. Hastings, 103 S.Ct. 1974 (1983).

In conclusion, there is no authority for the proposition that a defendant must be informed before a plea of guilty of the specific sentence that the prosecution will seek. Furthermore, petitioner has waived this issue by failing to request such notice before his plea of guilty. In fact the record shows that petitioner was fully aware that a death sentence would be sought in this case.

CONCLUSION

Respondent, the People of the State of Illinois, respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
Attorney for Respondent.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
Room 500 Richard J. Daley Center,
Chicago, Illinois 60602,
MICHAEL E. SHABAT,*
JOAN S. CHERRY,
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
*Counsel of Record, (312) 443-5496

No. 83-5785

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

STEVEN CLARK
Deputy Defender

KENNETH L. JONES
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street
8th Floor
Chicago, Illinois 60602
(312) 793-5472

COUNSEL FOR PETITIONER

OF COUNSEL:
Sheldon Bart Nagelberg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-5785

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

REASON FOR GRANTING WRIT

I. HERNANDO WILLIAMS' RIGHT TO A JURY DRAWN FROM A CROSS-SECTION OF THE COMMUNITY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE RACIAL MINORITIES FROM THE JURY WHICH ULTIMATELY IMPOSED THE DEATH PENALTY ON MR. WILLIAMS. ALTERNATIVELY IN LIGHT OF THE ON-GOING HISTORY OF RACIALLY MOTIVATED USE BY PROSECUTORS IN COOK COUNTY OF PEREMPTORY CHALLENGES, AS RECOGNIZED BY AT LEAST ONE ILLINOIS SUPREME COURT JUSTICE AND ONE DIVISION OF THE STATE APPELLATE COURT, THIS CAUSE SHOULD BE REMANDED TO THE STATE TRIAL COURT FOR AN EVIDENTIARY HEARING IN LINE WITH THE HOLDING IN SWAIN V. ALABAMA, 380 U.S. 202 (1965).

A. HERNANDO WILLIAMS' RIGHT TO BE TRIED BY A JURY DRAWN FROM A CROSS-SECTION OF THE COMMUNITY WAS VIOLATED BY THE PROSECUTOR'S DELIBERATE EXCLUSION OF ALL BLACKS FROM THE PETIT JURY.

Initially the respondent argues that the holding in Swain v. Alabama, 380 U.S. 202 (1965) is "still the law". This is not in

dispute. The question this Court should examine is whether the holding in Swain truly comports with the sentiments set forth in the Sixth and Fourteenth Amendments to the United States Constitution. Five members of this Court have recognized the importance of the issue of the prosecution's racially motivated use of peremptory challenges. McCray v. New York, ___ U.S. ___, 103 S. Ct. 2438. (1983)

In the original petition filed in this cause it was argued that until this court removes the strait-jacket of the Swain holding the courts of this nation will be unable to undertake the experimentation called for by the Justices who concurred in the denial of certiorari in McCray. This argument is still valid, but petitioner recognizes that some courts are courageous enough to experiment.

In McCray v. Abrams, ___ F. Supp. ___, 34 CrL. 229 (December 19, 1983) the U.S. District Court Eastern District of New York, undertook the re-evaluation of Swain called for by the concurring Justices and granted petitioner's writ of habeas corpus where the record supported the allegation that the prosecutor had used peremptory challenges to exclude racial minorities.

It is still petitioner's belief that this issue will not be freely explored, but to the extent that other courts do accept the invitation to experiment, the courts of this nation will reach diverse decisions. Indeed, in the Eastern District of New York, the federal court will investigate a state prosecutor's racial motivated use of challenges, (McCray), but the state courts cannnot. See People v. McCray, 57 N.Y. 542, 443 N.E. 2d 915 (1982).

Petitioner is not arguing that all segments of society must be reflected on every petit jury. He is simply arguing that the Fourteenth and Sixth Amendments to the United States Constitution cannot be read in such a way as to allow the prosecutors of this nation, who presumably take an oath to abide by the Constitution, to exercise their biases in the selection of juries and thus deprive defendants of the right to be tried by a jury reflecting a cross-section of the community. A cross-section cannot truly reflect every ethnic or social category; but a cross-section from

which large, identifiable segments of the society are automatically and ritually excluded is, by definition, a biased universe. The respondent's argument that if petitioner's position is adopted will result in prolifigating litigation is based on the unstated presumption that prosecutors will continue to employ their prejudices in excusing jurors. If this is true, there will be litigation on the issue. Deservedly so. In individual cases the issues involved will not be complex and the trial judges of this nation will have no great difficulty in resolving them as they control all other aspects of a trial.

Beginning on p. 10 of its response, respondent attempts to justify the exclusion of individual black jurors. When the excluded jurors are compared with white jurors accepted by the state, the racial motivation becomes embarrassingly apparent.

Respondent postulates that Theresa Powell was excused because she was an administrator for the University of Illinois, and "(p)rosecutors tend to be suspicious of academic intellectuals." Res. p. 10. Yet the first juror accepted by the State and one that ultimately ended up on the jury was Florence Yaroch, a school teacher (H. 268) who had recently completed an art appreciation course at the Art Institute. (H. 313) Another juror whose academic intellectualism seems to have been blunted by the paleness of her skin, Cathy Ann Savicki, was acceptable to the State and actually sworn as a juror, but was discharged for medical reasons before the entire jury was sworn. (H. 906-908, 1380, 1570). Robert Lynch, another teacher, (H. 1110) was acceptable to the State despite his liesure activities of reading history, playing the guitar and writing plays. (H. 1114-1115)

Other blacks were excused, according to Respondent because they identified their religion as Baptist. (Res. p. 10-11) Aside from the fact that this rationale comes close to, in and of itself, constituting an admission that the prosecutors deliberately set out to deprive defendant of a jury comprising a cross-section of the community, by depriving practicing Baptists of the right to serve on the jury, it is interesting to compare this reasoning with the State's failure to inquire into the religious affiliation of William Winter. During the State's

examination of Mr. Winter, no inquiry was made as to his religion, and on defense examination he stated simply that he was a protestant. (H. 2999) When the panel which included Mr. Winter was tendered to the State, no effort was made to determine if he were in fact a Baptist. Indeed, Mr. Winter was not even recalled. (H. 2197-2221) Thus while the State seeks to rely on the religious affiliation of the black prospective juries, those same beliefs were not subject to inquiry if the prospective juror was white.

Respondent argues that individual blacks were excused because they were "nervous". (Res. p.11) Yet Ms. Savicki's original protestations that she was not a claim person (H. 798) did not render her unacceptable to the State. Fannie Mae Green, a black woman, was excused because, the State now argues, she did not want to serve. (Res. 11) Such protestations coming from Rose Ocwieza did not render this lady unacceptable to the State as an alternate. (H. 2859) Nor did Eva Hartrick's statement that she did not want to serve prohibit the State from accepting her as a juror. (H. 1099, 1158)

Lillian Wallace, black, was excused, the State now declares, because she had an adolescent son. (Res. 11) Yet other jurors acceptable to the State had male children in their teens or early twenties: Florence Yaroch, (H. 308); Richard Lucking (H. 1044, 1123); Louise Klein (H. 1056, 1132); Rose Ocwieza (H. 2855); Laureen Redina (H. 3132). (The last four being accepted as alternates.)

Respondent has come up with two imaginative reasons to justify the exclusion of Sheryl Williams. First that she was young and unmarried. (Res. 11-12) This reasons should have precluded the State's acceptance of Miss Savicki (H. 785) or Eva Hartrich. Ms. Williams, aside from being black, had the misfortune to be employed as a bank teller and thus unacceptable. Yet Shirley Young, accepted for the jury, also worked in a bank. (R. 2069)

This Court should not allow the prosecutors of this nation to enforce their racial bias through the use of peremptory challenges.

B. WHERE AT LEAST ONE JUSTICE OF THE ILLINOIS SUPREME COURT AND ONE DIVISION OF THE ILLINOIS APPELLATE COURT HAVE RECOGNIZED THE EXISTENCE OF "AN OPEN SECRET" THAT PROSECUTORS IN CHICAGO AND ELSEWHERE HAVE HISTORICALLY AND SYSMATICALLY USED PEREMPTORY CHALLENGES TO REMOVE ALL OR ALL BUT TOKEN BLACKS FROM JURIES IN CRIMINAL CASES WITH BLACK DEFENDANTS, PETITIONER WILLIAMS IS ENTITLED TO A HEARING ON THIS ISSUE UNDER THE GUIDELINES OF SWAIN V. ALABAMA, 380 U.S. 202 (1965)

The Respondent argues that Petitioner has not proven a historic and continuing systematic discrimination in the exclusion of blacks from petit juries in Illinois or Cook County. Respondent here confuses the difference between pleadings and facts. All that Petitioner is requesting under this section of the argument is the hearing which Swain held he is entitled to when a historic pattern or racial discrimination is alleged.

The facts provided by the Illinois Coalition Against the Death Penalty were recognized, if criticized, by the Illinois Supreme Court. Those facts, and the observation of sitting judges which amplify the issue, are sufficient under the Swain holding, to require a hearing. This court should it choose to continue the validity of Swain v. Alabama, establish guidelines for the hearing on the issue of historic, systematic discrimination.

II. HERNANDO WILLIAMS' SIXTH AMENDMENT RIGHT TO A JURY DRAWN FROM A CROSS-SECTION OF THE COMMUNITY WAS VIOLATED BY THE EXCLUSION OF JURORS WITH SCRUPLES AGAINST THE DEATH PENALTY. IN AFFIRMING THE SENTENCES OF DEATH IMPOSED UPON WILLIAMS THE ILLINOIS SUPREME COURT ERRED BY MISAPPLYING STATE EVIDENTIARY WAIVER RULES TO A SIXTH AMENDMENT ISSUE.

The respondent's argument here is based on over-ruled cases and argument that the record is incomplete. The Illinois Supreme Court did not note any incompleteness in the record. Finally, under the rules of appellate practice in Illinois, the "record on

appeal shall be taken as true and correct unless shown to be otherwise..."Ill. S. Ct. Rule 239. This rule also provides for the amendment of the record, by either party if any omissions are discovered. The respondent is attempting here to inject a totally false factual issue to discourage this Court from reviewing this case.

The Respondent also argues that since the State did not use all of its peremptory challenges, the exclusion of a scrupled juror, specifically Delores Hudson, must be harmless error. Having no law to support this position, the respondent invents it, citing two Illinois decisions that, according to the State, accepted this "argument".

Respondent fails to recognized that both cases were reversed by this Court, although Respondent does cite to the decision in one of the cases. In that citation, Respondent indicates the case was affirmed. That case, People v. Moore, 42 Ill. 2d 73 (1969) was reversed in light of Furman v. Georgia, 408 U.S. 238 (1972) see Moore v. Illinois, 408 U.S. 786 (1972). The Respondent citation of People v. Speck, 41 Ill. 2d 177 (1968) is interesting since that case was reversed in light of Witherspoon v. Illinois, 391 U.S. 510 (1968). See Speck v. Illinois, 403 U.S. 946 (1971); See also Bernette v. Illinois, 403 U.S. 497 (1971) for the same result despite the holding of the Illinois Supreme Court.

As the cases cited in the original petition establish, it is the prosecution's burden to establish the disqualification of a juror on Witherspoon grounds. Where the record rails to justify the exclusion the death senterce cannot stand. Davis v. Georgia, 492 U.S. 122 (1976).

III. THE ILLINOIS DEATH ACT BOTH ON ITS FACE AND AS APPLIED AGAINST HERENANDO WILLIAMS IS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. THE ILLINOIS DEATH ACT, BY VESTING TOTAL DISCRETION IN THE PROSECUTORS AS TO WHOM SHALL BE SUBJECT TO THE DEATH PENALTY ENSURES THAT CAPITAL PUNISHMENT WILL BE INFLICTED IN A FREAKISH MANNER

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner stands on his argument in his original petition.

B. THE ILLINOIS DEATH ACT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT IN THAT IT PROVIDES NO DEFINED LIMITS ON THE FACTORS WHICH MAY BE CONSIDERED BY THE SENTENCING AUTHORITY, NOR DOES IT ALLOCATE A BURDEN OF PROOF AS TO THE ULTIMATE ISSUE.

Petitioner stands on the argument under this heading advanced in his Petition.

C. THE ILLINOIS DEATH SENTENCING SCHEME FAILS TO PROVIDE ADEQUATE COMPARATIVE REVIEW PROCEDURES TO INSURE THAT THE DEATH PENALTY IS NOT IMPOSED IN AN ARBITRARY OR DISPROPORTIONATE MANNER.

Petitioner stands on his original argument but does acknowledge the holding in Harris v. Pulley, ___ U.S. ___, 34 Cr.L 3027 (1984). It is Petitioner's feeling that the absence of proportionality review in light of the vagueness of the Illinois Statute and the over-broad grant of prosecutorial discretion, renders the Illinois Statute in violation of the Eighth Amendment. This position is consistent with the holding in Harris v. Pulley, since this Court recognize that a capital statute could be "so lacking in other checks on arbitariness that it would not pass constitutional muster without comparative proportionality review..." 34 Cr.L at 3031

IV. HERNANDO WILLIAMS' RIGHT TO DUE PROCESS AND TO BE PROTECTED FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE APPLICATION OF AN AGGRAVATING FACTOR THAT POTENTIALLY RENDERS ALL HOMICIDES CAPITAL OFFENSES.

The Respondent argues that this case is unique. Yet in People v. Brownell, 79 Ill. 2d 508, 404 N.E. 2d 181 (1980) which involved the same crimes and, according to the trier of fact, the

same motives the Illinois Supreme Court held that the application of an over-broad aggravating factor tainted the determination that death was the appropriate sentence.

Due Process and Equal Protection, as applied to the State through the Fourteenth Amendment, do not allow for the creation of the Hernando Williams acception. Nor does the Eighth Amendment to the United States Constitution support such a freakish result.

V. SINCE ONLY THE PROSECUTORS COULD DETERMINE WHETHER OR NOT THE DEATH PENALTY WOULD BE SOUGHT AGAINST HERNANDO WILLIAMS HIS RIGHTS TO DUE PROCESS WERE VIOLATED WHEN THE COURT ACCEPTED HIS PLEA OR GUILTY WITHOUT INFORMING WILLIAMS THAT EVEN A CONVICTION BY PLEA OF GUILTY WOULD SUBJECT HIM TO THE STATE'S ATTORNEY DISCRETIONARY ELECTION TO SEEK THE DEATH PENALTY.

The argument here, contrary to the Respondent's attempt to confuse the issue, is simply that Hernando Williams was never told by the trial court prior to its acceptance of his plea of guilty that he could be sentenced to death, even though he pled guilty. It does not matter what his lawyers knew; it does not even matter what Williams could reasonably expect. All that matters is that Williams was told he could be sentenced to death "if tried and convicted". (H. 10-13) No motion was made as to what sentences could be imposed on a plea of guilty.

A defendant facing the ultimate penalty must be clearly and properly advised by the court of the consequences of his plea before the plea can be said to comport with due process. Where, as here, the record does not establish that the plea was knowingly and intelligently entered, the plea must be set aside. Boykin v. Alabama, 395 U.S. 238 (1969).

CONCLUSION

For the foregoing reasons, Petitioner Hernando Williams, respectfully requests that a Writ of Certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

STEVEN CLARK
Deputy Defender

KENNETH L. JONES
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street
8th Floor
Chicago, Illinois 60602
(312) 793-5472

COUNSEL FOR PETITIONER

OF COUNSEL:
Sheldon Bart Nagelberg